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APPENDIX

Supreme Court of the United States

October Term, 1968

No. 65

TIMOTHY F. LEARY,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1968 — CERTIORARI GRANTED JUNE 10, 1968

INDEX

	PAGE
APPENDIX A—Opinion of the U.S. Court of Appeals for the Fifth Circuit	1a
APPENDIX B—Opinion of the U. S. Court of Appeals for the Fifth Circuit, denying Petition for Rehearing	37a
APPENDIX C—Judgment of the U.S. Court of Appeals for the Fifth Circuit	41a
APPENDIX D—Order of the U.S. Supreme Court granting Certiorari	42a
APPENDIX E—Constitutional, Statutory and Regulatory provisions involved	43a
A. Constitutional Provisions:	
Amendment V to the Constitution	43a
B. Statutory Provisions:	
21 U.S.C. § 176a	43a
26 U.S.C. § 4741-4	44a-48a
26 U.S.C. § 4751-5	48a-52a
26 U.S.C. § 4773	54a
§ 4775	55a
C. Regulatory Provisions:	
26 C.F.R. 152.61-152.68	55a-57a

APPENDIX F—Portions of the Record

	PAGE
1. Relevant docket entries	58a
2. Indictment	60a
3. Testimony	62a
A. Testimony of Customs Inspector Herbert O. Best	62a
B. Testimony of Customs Inspectress Helen M. Loftis	72a
C. Testimony of Customs Agent Rey L. Hatch	74a
D. Testimony of Customs Chemist Fred V. Eggerton	80a
E. Testimony of petitioner, Timothy F. Leary	83a
F. Testimony of Dr. Joe Fort	92a
G. Trial Judge's Charge to Jury	93a

INDEX

PAGE

APPENDIX A—Opinion of the U.S. Court of Appeals for the Fifth Circuit 1a

APPENDIX B—Opinion of the U. S. Court of Appeals for the Fifth Circuit, denying Petition for Rehearing 37a

APPENDIX C—Judgment of the U.S. Court of Appeals for the Fifth Circuit 41a

APPENDIX D—Order of the U.S. Supreme Court granting Certiorari 42a

APPENDIX E—Constitutional, Statutory and Regulatory provisions involved 43a

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Amendment V to the Constitution 43a

B. Statutory Provisions:

21 U.S.C. § 176a 43a

26 U.S.C. § 4741-4 .....44a-48a

26 U.S.C. § 4751-5 .....48a-52a

26 U.S.C. § 4773 ..... 54a

§ 4775 ..... 55a

C. Regulatory Provisions:

26 C.F.R. 152.61-152.68 .....55a-57a

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C. Testimony of Customs Agent Rey L. Hatch	74a
D. Testimony of Customs Chemist Fred V. Eggerton	80a
E. Testimony of petitioner, Timothy F. Leary	83a
F. Testimony of Dr. Joe Fort	92a
G. Trial Judge's Charge to Jury	93a

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(September 29, 1967)

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

AINSWORTH, Circuit Judge: This unusual criminal case delves into the new realm of psychedelic experience, and into mysticism, religion and its free exercise. The principal issue we must decide is whether the conviction of appellant for violations of federal criminal statutes relating to marihuana—a psychedelic drug which the defendant claims he uses as a religious sacramental aid—contravenes the accused's First Amendment right to the free exercise of his religion. There are, however, other important questions, some of them constitutional also, which we will discuss fully.

Dr. Timothy Leary, appellant, and his minor daughter, Susan Leary, age 18, were jointly indicted on three counts

for offenses pertaining to marihuana. Dr. Leary was tried before a jury on March 11, 1966. Count 1, which charged the smuggling of marinuana into the United States which should have been invoiced (declared), was dismissed by the court following a motion for judgment of acquittal. Dr. Leary was found guilty, however, on Count 2, which charged transportation, and facilitation of transportation, and concealment of marihuana after importation,[1] in violation of 21 U.S.C. § 176a,[2] and on Count 3, which

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[1] Count 2 of the indictment reads as follows:

"*Count Two.* That on or about December 22, 1965, in the Laredo division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, hereinafter called defendants, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three (3) ounces of Marihuana (Cannabis Sativa), more or less, after importation, and the defendants then and there knew the said Marihuana to have been imported into the United States contrary to law, in violation of Section 176(a), Title 21, United States Code."

[2] 21 U.S.C. § 176a provides:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

(No suspension of sentence, probation or parole is allowed as to a conviction for this offense. See 26 U.S.C. § 7237(d).)

charged transportation and concealment of marihuana by defendants as transferees, required to pay the transfer tax imposed by the Internal Revenue Code,[3] in violation of 26 U.S.C. § 4744(a)(2).[4] Appellant was sentenced to the maximum penalties and fines provided for such offenses, subject, however, to the provisions of 18 U.S.C. § 4208(b), and was ordered committed to the medical cen-

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[3] Count 3 of the indictment reads as follows:

"*Count Three.* That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, transferees, required to pay the transfer tax imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code."

[4] 26 U.S.C. § 4744(a)(2) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

"Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or [h]is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

26 U.S.C. § 7237 provides for a maximum fine of $20,000 an imprisonment of ten years for a first offense in violation of 26 U.S.C. § 4744(a)(2).

The rate of the special tax on marihuana is provided for in 26 U.S.C. § 4741. The written order form required of the transferee of marihuana is set forth in 26 U.S.C. § 4742.

ter at Springfield, Missouri, for a complete study[5] to be used by the court as a basis for determining the ultimate

[5] 18 U.S.C. § 4208 provides in pertinent part that

"(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. * * *

"(c) Upon commitment of a prisoner sentenced to imprisonment * * * the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary."

The court ordered that the sentences imposed be consecutive and the fines cumulative (amounting to a total of 30 years and $40,000). The district judge of course is awaiting the outcome of this appeal, and upon our affirmation, under the provisions of 18 U.S.C. §4208(b) may, in his discretion, reduce the term of imprisonment or place the appellant on probation under Count 3 and reduce the sentence of imprisonment under Count 2.

However, conviction under 21 U.S.C. § 176a requires a mandatory sentence of five years, and under 26 U.S.C. § 7237 there can be no suspension of sentence or probation for such conviction.

sentence in the case. Defendant's motion for a new trial was denied.

Susan Leary was tried at the same time as her father, Dr. Leary, by the court without a jury (trial by jury having been waived) and found guilty on Count 3 of the indictment but not guilty on Counts 1 and 2. Imposition of sentence was suspended and she was placed on probation during the remainder of her minority, without supervision, under the provisions of the Youth Corrections Act, 18 U.S.C. § 5010(a). Her appeal was then dismissed on her own motion.

The facts of this case are relatively uncomplicated.

Dr. Leary left New York on December 20, 1965 by automobile, accompanied by his two children, Susan, age 18, and John, age 16, and two other persons. Their destination was Yucatan, Mexico, and the alleged purpose of the trip was a Christmas vacation for the Leary children and to provide Dr. Leary the opportunity to write a book and to prepare for a summer session to be conducted with a research group at his home in Millbrook, New York. On December 22, 1965, Dr. Leary and the four passengers drove across the international boundary at Laredo, Texas, into the Republic of Mexico, stopped at the Mexican immigration station for several minutes, and turned back toward the United States. At approximately 6:45 p.m., they arrived at the secondary inspection area, Laredo International Bridge, Laredo, Texas. Dr. Leary, the driver of the vehicle, told a U. S. Customs official that they had driven across the boundary into Mexico within the prior hour, that they had been unable to secure tourist permits and had been told by Mexican immigration officials to return the following morning at 8:00 a.m. at which time the necessary Mexican permits would be given to them. The U. S. inspector asked the group if they had anything to declare from Mexico and was told that they had not. After

the occupants alighted from the vehicle, the U.S. inspector observed some vegetable material and a seed on the floor of the automobile which appeared to him to be marihuana. Thus the five travelers were arrested. A search of the baggage, the vehicle and of the individuals was made. Sweepings from the car floor and glove compartment were later proved to be marihuana.* While Dr. Leary was being searched, he stated that he had never used marihuana. A woman Customs inspector performed a personal search of the two female travelers, which resulted in the finding of a small metal container on the person of Susan Leary after she had disrobed. Within the container were three partially smoked marihuana cigarettes, a small quantity of semi-refined marihuana and capsules of detroamphetamine sulfate (said to be a nonprohibitive narcotic). Demand was made of Dr. Leary for the required Treasury Department transferee form. He stated that he had no such form. Susan Leary, in response to the same demand, refused to make any statement. Dr. Leary admitted to a U.S. Customs agent that the metal box taken from his daughter, Susan, containing the marihuana, was his property. He further stated in the presence of two Government agents that he knew more about narcotics and marihuana than either of them.

Dr. Leary testified on his own behalf. He admitted that the seized marihuana had been obtained by him in New York and had been in his possession continuously on his trip from New York to Laredo; that he had neither obtained an order form nor paid a transfer tax for the marihuana as required by the statute. He said that he asked the four people in his group to get rid of the marihuana; that just prior to arriving at the U.S. Customs Station, while crossing the International Bridge, he asked if the

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* The indictment refers to three ounces of marihuana. Analysis and weighing of the seized material disclosed that a total of a little less than one half of an ounce had been found and confiscated.

marihuana had been disposed of and was told by Susan, his daughter, that it had not been and it was in her possession. He further admitted that while on the trip from New York to Mexico at an overnight stop in New Orleans, Louisiana, he smoked marihuana to relieve a low spiritual state; that this incident was equivalent to an hour of silent meditation from which he derived spiritual benefit. Dr. Leary testified that he was familiar with the laws of the United States relative to marihuana and was aware that his actions were contrary to such laws.[1] In his testimony he attempted to justify use of this drug which he said was for religious and scientific purposes.

Dr. Leary has an impressive academic background. He testified that he received a Ph. D. degree in Clinical Psychology from the University of California. During the years from 1944 to 1950 he wrote and published several publications relative to the use of psychedelic drugs in the treatment of the mentally ill, including thirteen scientific articles and two books. In 1950 he helped found the Kaiser Psychiatric Clinic in Oakland, California. During the next eight years he received nearly one-half million dollars in federal grants at the Kaiser Clinic for research work on mental illness. He published four diagnostic tests relative to mental illness which have been used in diagnosing and treating mental patients in over 750 clinics and hospitals in the United States and which have been translated into several foreign languages. He served on the University of California medical faculty from 1953 to 1956. In 1959 he joined the Harvard University faculty.

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[1] Dr. Leary was questioned by the court as follows:

"The Court: I take it that you make—that you do not deny that you have recognized all the time that the transportation and the use, and so forth, of this marihuana is contrary to the laws of the United States?

"The Witness: Yes, sir. I know they are contrary to the laws of the United States."

Appendix A

In 1960, while visiting Mexico, he testified that he had "the most intense religious experience" he had ever had in his life as the result of having eaten a number of the "Sacred Mushrooms" of Mexico. The incident changed his life. Since that time he has written five books and thirty-eight articles pertaining to religious and scientific use of psychedelic drugs, and he has devoted his life to attempting to understand the religious experience and how it can be applied to help others. He said that he formed a religious research group after returning to Harvard University, and with the help of Aldous Huxley, he experimented with certain psychedelic drugs. In 1962 he studied Hinduism and after a year became a member of a Hindu sect. In 1963 he left Harvard, performed further experimental work in Mexico, and later established a center and workshop for religious and scientific research in Millbrook, New York, which center is now his home. The building also serves as a place for religious meditation and spiritual retreat. Rooms in the house contain shrines devoted to Hindu, Buddhist and Christian ways of finding God, as well as religious pictures and statues. Dr. Leary has traveled extensively through Asia in pursuit of his religious endeavors and has studied Buddhism and Hinduism with several religious teachers and monks. While studying in India with Sri Asoke Fukir, a religious leader, Dr. Leary participated in religious rituals in which marihuana was used. He was converted to Hinduism, and is now a member of the Brahmakrishna sect in Massachusetts.

Dr. Leary further testified that he first used marihuana in August or September 1964. Marihuana enables him to attain what he describes as the third level of consciousness. Other psychedelic drugs take a person to a higher level. According to the Hindu religion, there are thousands of roads to illumination to the god within a person. Different sects specialize in different aids. The Hindu sect in India of which he became a member uses marihuana for religious

illumination and meditation. He ordinarily uses marihuana less than once a week and then only for religious purposes. He draws no distinction between his religious beliefs and his scientific experimentation. If he could not use marihuana it would not affect his religious beliefs but he would consider it a violation of those beliefs and practices if he were denied its use.

Dr. Leary said he acquired the marihuana in New York which led to his conviction. He testified that the reason he did not declare the marihuana at the U.S. Customs Office at Laredo was his apprehension of being subjected to investigation or arrest. He never complied with the Treasury Department regulations relative to marihuana because he knew that he could not obtain permission for its use inasmuch as his research is not performed in a laboratory and is of a religious nature; that the law makes no provision for the use of marihuana under such circumstances; that if he had attempted to register or to pay the required tax, the marihuana would have been taken from him and he would have been subjected to legal action. He had applied for and been refused permits for other chemicals such as mescaline, peyote and LSD. He believes he has both a moral and a political right to possess marihuana.

Fred Swain (Sri Kalidas, in religion) testified on behalf of appellant. He is an American Hindu Sanyasa (monk), a renunciant, living in a monastery, who joined the religious order of which appellant is a member in 1948. He met Dr. Leary in 1962 and later participated in psychedelic experiments with him at Harvard University. While traveling in India he was often in the company of Dr. Leary; he smoked marihuana with him in the Rishikesh, a city of holy men, along the banks of the Ganges River, in Hindu religious services. He said that marihuana plays a very important part in the rituals of the Hindu sect conducted by Sri Asoke Fukir in India. The Brahmakrishma sect in the United States of which he and Dr. Leary are members is a

highly established authority sect in India, recognized throughout India by all Hindus. He admitted that he was partially able to achieve and practice his religious beliefs in the Hindu sect without the use of marihuana. He does not use marihuana in the United States because it is unavailable; he is forced to use other psychedelic drugs in conjunction with meditation and prayer.

Dr. Ralph Metzner, a psychopharmacologist who received his Master's degree from Oxford and Ph. D. in Psychology from Harvard, testified on behalf of appellant. He co-authored with Dr. Leary the book "Psychedelic Experience" as well as several articles including "Reducing Criminal Behavior" by the use of the psychedelic drug psilocybin (the extract of the sacred mushroom). The word "psychedelic" refers to a class of drugs, which includes LSD, mescaline, marihuana, among others, whose primary effect is to expand consciousness, heighten intellectual activity and sensory awareness. In India he was initiated into the same Hindu sect of which Dr. Leary is a member. He participated with Dr. Leary in several scientific experiments under the auspices of Harvard University. He also assisted Dr. Leary in conducting seminars, giving lectures, writing books and giving training courses in consciousness expansion without drugs. He corroborated Dr. Leary's testimony concerning the religious nature and character of the Millbrook center in New York.[8]

Appellant's points of error are stated substantially as follows:

1 (A). The District Court erred in refusing to instruct the jury to acquit appellant if it found his religious claims to be honest and in good faith.

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[8] Out of the presence of the jury Dr. Metzner testified at length that marihuana was a mild, relatively harmless and non-addictive drug. Dr. Joe Fort, medical doctor with special training in psychiatry and drug addiction, also testified out of the presence of the jury substantially to the same effect.

Appendix A

1 (B). In light of the federal exemption from restrictive legislation granted to religious users of peyote and the Government's inability to establish that marihuana is more harmful than peyote, the denial of a religious exemption from the marihuana legislation is an invidious religious discrimination in violation of the First and Fifth Amendments.

2. Denial of appellant's motions for a bill of particulars specifying the location, direction and time of alleged transportation was reversible error; alternatively, the indictment was fatally insufficient.

3. The District Court's instructions on the meaning of the statutory presumptions (a) effectively directing conviction and imposed upon appellant the burden of proving his innocence; (b) were misleading and authorized convictions if appellant did not prove to the jury's "satisfaction" that his possession was "lawful" and "legitimate"; and (c) failed to direct acquittal if the jury believed that appellant lacked knowledge of illegal importation—all in violation of the Fifth and Sixth Amendments and amounting to "plain error" under Rule 52(b), Fed. R. Crim. P.

4. The Government's closing argument to the jury far exceeded the bounds of fair comment.

5. The Government's failure to disclose that one of the major witnesses was under two federal indictments at the time of the trial denied appellant a fair trial.

6. The presumption under 21 U.S.C. § 176a that marihuana is illegally imported and that a possessor has knowledge of illegal importation is arbitrary and irrational in view of the high proportion of marihuana in the United States which is domestically grown.

7. The statutory requirement of a written order form (26 U.S.C. § 4742) and the imposition of a transfer tax (26 U.S.C. § 4741(a)) violate appellant's constitutional privilege against compulsory self-incrimination and render invalid the conviction under Count 3.

8. The District Court erred in refusing to instruct the jury that they could consider as a defense to Count 2, the defendant's honest and sincere belief that he had a right to engage in his activities because of his religious, scientific, or parental beliefs, and that these beliefs could negate the specific intent necessary for conviction under the statute.

Religious freedom, guaranteed by the Constitution, must be weighed with the public interest and the broad power to legislate vested in Congress by the Constitution.[9] Thus the First Amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *State of Connecticut*, 310 U. S. 296 (at 303, 304), 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The freedom to act is conditional and relative and Congress may prescribe and enforce certain conditions to control conduct which may be contrary to a person's religious beliefs in the interest of the public welfare and protection of society. See the Supreme Court's decisions in the anti-bigamy cases, *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244 (1878); *Davis* v. *Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890), and the Sunday-closing-law cases, *McGowan* v. *State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Two Guys From Harrison-Allentown* v. *McGinley*, 366 U.S. 582, 81 S. Ct. 1135, 6 L. Ed. 2d 551 (1961); *Braunfeld* v. *Brown*,

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[9] See Art. I, Sec. 8, United States Constitution; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 at 1390 (1967).

366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961); *Gallagher* v. *Crown Kosher Super Mkt. of Mass.*, 366 U.S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961).

In *Reynolds* v. *United States, supra,* 98 U.S. at 166, the Supreme Court, in denying Mormons an exemption from anti-bigamy laws, said, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." The Court recognized that religious practice could not be accepted as justification for an overt criminal act; that to permit a man to excuse his unlawful practices because of his religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (98 U.S. at 167.)

In *Braunfeld* v. *Brown, supra,* which upheld the constitutional validity of a Pennsylvania Sunday-closing statute, the Court reaffirmed the principles of *Cantwell* v. *State of Connecticut, supra,* and *Reynolds* v. *United States, supra,* with its statement that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions" (366 U.S. at 603), and that "legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." (366 U.S. at 603, 604.)[10]

Congress has seen fit to legislate, with appropriate criminal sanctions, concerning the possession, importa-

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[10] See also *Davis v. Beason,* 133 U. S. 333, 342-343, 10 S. Ct. 299, 33 L. Ed. 637 (1890), in which the Supreme Court said: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

tion, concealment, and taxation of marihuana. The severity of the penalties provided by statute for the violation of these laws provides an insight into the grave concern of Congress to control the use of this drug. The testimony of appellant's witnesses relative to his sincerity of purpose in his religious and scientific endeavors is not pertinent here; nor is the evidence about the so-called harmless nature, the therapeutic value, and the accepted use of marihuana for religious rituals by certain sects in India.

Our concern is with the laws of the United States, which appellant admittedly, knowingly and purposely violated because they conflicted with his personal religious beliefs and practices. Appellant has attempted to demonstrate that the experience he finds through the use of marihuana is the essence of his religion. We do not inquire into the truth or verity of appellant's religious beliefs—to do so would be violative of the Free Exercise Clause of the First Amendment. *United States* v. *Ballard*, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). But appellant's religious creed and the sincerity of his beliefs are not at issue here. The district judge properly refused an instruction to the jury that they should acquit the defendant if they found his religious practices were in good faith.

Appellant's reliance on *Sherbert* v. *Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts. In *Sherbert* the Supreme Court held that the disqualification of a member of the Seventh Day Adventist Church for unemployment benefits under the South Carolina Unemployment Compensation Act, because of her refusal to work on Saturday, imposed a burden on the free exercise of her religion. The Court in arriving at its conclusion considered whether there was

"some compelling state interest" in the statute which justified "the substantial infringement of appellant's First Amendment right" (374 U.S. at 406), and found no such state interest.

Here the paramount Government interest in the enforcement of the laws relative to marihuana is the protection of society. We cannot reasonably equate deliberate violation of federal marihuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits. The Court in *Sherbert,* while upholding the Free Exercise Clause under the facts of that case, recognized that it had rejected challenges under the same clause "to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U.S. 599, 603, 81 S. Ct. 1144, 1146, 6 L. Ed. 2d 563. The conduct or action so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643; Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645; Cleveland v. United States, 329 U. S. 14, 67 S. Ct. 13, 91 L. Ed. 12." (374 U. S. at 403.)

The unlawful transportation, possession and use of marihuana falls within the category of cases cited in *Sherbert* which require governmental regulation. "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion'." *Davis* v. *Beason,* 133 U. S. 333, 345, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

There is no evidence in this case that the use of marihuana is a formal requisite of the practice of Hinduism, the religion which Dr. Leary professes. At most, the evidence shows that it is considered by some as being an aid

to attain consciousness expansion by which an individual can more easily meditate or commune with his god. Even as such an aid, it is not used by Hindus universally.

Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless. Thus the question is whether the conduct or action so regulated and prohibited under severe criminal penalties by Congress (i.e., trafficking in marihuana) has posed "some substantial threat to public safety, peace or order," *Sherbert, supra,* 374 U. S. at 403. Congress has demonstrated beyond doubt that it believes marihuana is an evil in American Society and a serious threat to its people. It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, "turn on," is the "in" thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.

Appellant argues that the religious use of peyote, a psychedelic hallucinogen, by Indians who are members of the Native American Church has been constitutionally protected by the Supreme Court of California in *People* v. *Woody,* 40 Cal. 69, 394 P. 2d 813 (1964). He refers also to the California Supreme Court's decision in *In Re Grady,* 39 Cal. 912, 394 P. 2d 728 (1964), decided the same day

as *Woody*, in which conviction of a "self-styled peyote preacher" for unlawful possession of narcotics, namely, peyote, was annulled and a new trial granted in order that the defendant might have an opportunity to prove that his use of peyote was in connection with an honest and bona fide practice of a religious belief. By parity of reasoning he contends that marihuana, another psychedelic drug, is entitled to the same constitutional protection as peyote. With due deference to the California Supreme Court, we are of course not bound by its decisions. However, we note an essential difference between *Woody* and the instant matter in that peyote in the *Woody* case played "a central role in the ceremony and practice of the Native American Church, a religious organization of Indians," and that the "ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion." Grady was apparently the spiritual leader of a group of individuals and provided peyote for the group which he said was for religious purposes.

We are not impressed that the California cases are directly in point, and we will not apply them insofar as the circumstances of this case are concerned.[11]

In the early case of *State* v. *Big Sheep*, 243 Pac. 1067 (1926), the Montana Supreme Court held, "It was clearly within the power of the Legislature to determine whether the practice of using peyote is inconsistent with the good

[11] The Federal Commissioner of Food and Drugs has exempted peyote from use in bona fide religious ceremonies of the Native American Church. 21 C.F.R., Part 166.3(c). But this would hardly justify our holding, as appellant contends, that the criminal statutes against marihuana are unconstitutional because of religious discrimination. The exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana by any person who claims he is using it as a religious practice.

order, peace, and safety of the state," against the contention that the defendant's religious freedom was infringed. In *State* v. *Bullard*, 267 N. C. 599, 148 S. E. 2d 565, 569 (1966), the North Carolina Supreme Court held, "The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here—in law nor in morals."

The District Court denied appellant's request for a bill of particulars which sought information to ascertain whether it was the Government's intention to rely on his possession of marihuana prior to entry into Mexico or following importation into the United States from Mexico, and whether it was the Government's contention that he was guilty of the overt act of smuggling. The smuggling count was withdrawn from the jury by the court so we turn our attention to Count 2, which charges appellant with transportation and concealment of marihuana after knowledge of importation, and Count 3, which charges transportation and concealment without having paid the necessary transfer tax. Appellant stated that the information requested was necessary to prepare an adequate defense and to avoid the possibility of double jeopardy. Appellant further contended that depending on the theory of the prosecution, different legal defenses would arise, and the requested information was necessary to decide whether he should exercise his right to testify. From a reading of Counts 2 and 3 we conclude that they are not duplicitous. Each count states the date and the place of the offense and adequately apprises appellant of the nature

of the offense charged. Granting or denial of a bill of particulars is a matter within the sound discretion of the trial judge, and will not be interfered with on appeal unless there is abuse or prejudice. *Joseph* v. *United States*, 5 Cir., 1965, 343 F. 2d 755; *Robertson* v. *United States*, 5 Cir., 1959, 263 F. 2d 872; *Johnson* v. *United States*, 5 Cir., 1953, 207 F. 2d 314. There was no such abuse or prejudice here.

Appellant contends, alternatively, that the indictment in this case is fatally insufficient. In this Circuit's decisions in *Thomas* v. *United States*, 314 F. 2d 936 (1963), and *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (1963), the defendants were charged with smuggling marihuana and with transportation of the drug without having paid the necessary tax thereon. Proof was adduced by the Government that the marihuana had been obtained by the defendants in Mexico. The court held in *Thomas*, and reiterated in *Marquez-Anaya*, that an indictment charging transportation and concealment of marihuana without having paid the transfer tax was necessarily predicated upon the defendants having obtained the drug within the United States, and because of the Government's proof to the contrary, that is, that the marihuana had been smuggled by the defendants into the United States from Mexico, the conviction under the tax count could not stand. However, the instant matter is clearly distinguishable from our holdings in *Thomas* and *Marquez-Anaya*. Here, as the case developed, the Government's evidence (through testimony of United States Customs Agent Hatch of statements made to him by the accused) showed that the marihuana was acquired by defendant in the United States. Dr. Leary's own testimony later in the trial was to the same effect and the district judge consequently withdrew the smuggling count from the jury's consideration. The defendant admitted all of the elements of Count 2 except knowledge of importation. The Government, supported by appellant's

own testimony, proved the elements of transportation and concealment of the drug under Count 2, although under the statute it was incumbent on it merely to show possession in order to authorize conviction unless the defendant explained his possession to the satisfaction of the jury. Appellant admitted transporting the marihuana from New York and crossing and recrossing the international border between the United States and Mexico with the marihuana in his possession. He made no effort to explain his possession of the illegal drug to the jury beyond his defense that use of marihuana was a sacramental aid in the practice of his religion—an explanation we have already pointed out is insufficient and immaterial. In addition to the facts proved by the Government, conviction on Count 3 was also justified by appellant's own testimony—his candid admission that he had never paid the required tax as a transferee. The counts were, therefore, neither inconsistent within themselves nor with each other.

There is likewise no merit to appellant's argument that the court's instructions implied that possession, not satisfactorily explained, *compelled* conviction. The court assiduously avoided such an instruction. At the outset the trial judge explained the presumption of innocence which attaches to every defendant brought to trial in a criminal case. He instructed the jury that the Government must prove the accused's guilt beyond a reasonable doubt and defined that term. The district judge quoted the exact provision of the statutory inference in 21 U.S.C. § 176a, i.e., "such possession shall be deemed sufficient evidence as to *authorize* conviction unless the defendant explains his possession to the satisfaction of the jury," (emphasis added), and explained its meaning in the language of the statute by stating: "The means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana he had." The court clearly and adequately defined the terms "unlawfully," "knowingly," and "with

intent to defraud" and twice repeated the necessity of the jury finding such elements beyond a reasonable doubt to warrant conviction. The jury was advised of its affirmative duty to acquit in the absence of such findings. We do not construe the court's instructions as *requiring* conviction on evidence of possession of marihuana, but only as *authorizing it.*[12] Appellant's argument is, therefore, untenable,

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[12] Pertinent parts of the judge's instructions to the jury on this question are quoted as follows:

"Now, I instruct you, ladies and gentlemen, that this defendant, as is true of every defendant brought to trial in this court, is presumed at the outset to be innocent.

"The defendant starts off with a clean slate, and by pleading 'Not Guilty,' as he has done here, has imposed upon the Government to prove his guilt to you beyond a reasonable doubt.

"By the term 'reasonable doubt' as I use it here, is meant such a doubt as may arise in your minds when, after fully and impartially considering all of the evidence, the jurors do not feel satisfied to a moral certainty of the accused's guilt.

"A 'reasonable doubt' does not mean a mere possible or imaginary doubt or a mere conjecture; a 'reasonable doubt' is one which appeals to and is based upon your reason.

"If after fully and impartially considering all of the evidence you have a reasonable doubt as to the guilt of the defendant, it's your duty to acquit.

"On the other hand, if after fully and impartially considering all of the evidence you are convinced beyond a reasonable doubt of the guilt, then it's your duty to convict." (R. 591, 592.)

* * *

"Now, I want to read the statutes to you which the defendant is alleged to have violated.

"Section 176(a) of Title 21 of the United States Code, in pertinent part, reads as follows:

"Notwithstanding any other provision of the law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced—

"Now, that has to do with Count 1, which I am withdrawing from your consideration.

[Continued on page 22]

especially since he did in fact testify that he knew that his actions were contrary to the laws of the United States.

[Continued from page 21]

". . . or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute thereafter provides.

"With the further paragraph:

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"What that means, of course, is this:

"If the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana which he had.

"The other statute alleged to have been violated is 4744(a)(2) of Title 26 of the Code, reading in pertinent part as follows:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4744(a)(1) to acquire or otherwise obtain any marihuana without having paid such tax or, to—and this is the part that we are interested in—to transport or conceal or, in any manner facilitate the transportation or concealment of any marihuana so acquired or obtained. Proof that any person shall have in his possession any marihuana and shall have failed after reasonable notice and demand by the Secretary or his delegate to produce the order form required by Section 4742 to be retained by him, shall be presumptive evidence of guilt under this subsection." (R. 595-598.)

* * *

Appendix A

Appellant contends that the closing arguments to the jury by Government counsel far exceeded the bounds of fair comment, invited prejudice based on educational, economic and regional differences between the accused and the jurors, expressed strong hostility toward him, asserted that he was irresponsible regarding his child's welfare, attacked him for offering a religious defense, bolstered a witness' credibility and generally inflamed the jury's emotions, amounting to plain and reversible error. Pertinent parts

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"And the statute which I have read to you with regard to this third count provides that failure to produce the order form shall be presumptive evidence of guilt under this subsection.

"Now, you might have some difficulty with the question on Count 2 by reason of the fact that the statute requires that the defendant receive—by reason of the fact that the statute provides that one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute provides.

"The Government is entitled to rely upon the presumption which I read to you earlier; that is, whenever on trial for a violation of this sub-section the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.

"I mention this a second time because you might be confused about the question of importation.

"We are not talking necessarily about the importation or what the Government contends was importation here at the bridge.

"The defendant has told us that he received the marihuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally and that he knew it had been imported illegally unless he explains his possession to the satisfaction of the jury." (R. 608-610.)

of the arguments to which objections were made are set forth more fully in the margin below,[18] but they refer principally to the prosecutor's statements that appellant was "irresponsible" (especially with reference to the welfare of his children), his defense was a "colossal hoax," "just hogwash," to Government counsel's statement that "I cannot remember a case I have felt more strongly about

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[18] The following is taken from the final argument of Government counsel to the jury:

"And all this other stuff, I submit, is just hogwash. It's just an attempt to come down here to Laredo, Texas and get a federal jury to believe that because he has got a Ph. D and because he has got a 3,000 acre mansion in Upper New York where they experiment all the time, that he is not subject to the laws of the United States of America.

"And I say to you respectfully and sincerely that it not but hogwash, that Dr. Leary, like everybody else, high, low, black, white—any color—are subject to the laws equally, of the United States. That is one thing that we have that many people in the world do not have. We have a country of law. We are governed by law and we all are subject to the same rules, rich, poor, race, creed or color—makes no difference. The law applies equally to everyone, to all citizens. And that is one great thing about our country." (R. 545, 546.)

* * *

"But after hearing this testimony for several days I don't think there can be any serious question about the fact that this business about psychedelics is not in the encyclopedias and it appears that there has nothing ever been written in print about it except things that he was connected with. This is a hoax and we respectfully submit that they tried to come down here and put off on a good jury of Laredo people a colossal hoax." (R. 551.)

* * *

"To say that this was an unusual case would be a gross understatement, and to say that it's an important case would be a gross understatement, because, ladies and gentlemen, I have participated in what I feel is a considerable number of criminal cases and I cannot remember a case that I have felt more

than I have this case," and his further statement that "I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself."

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strongly about than I have this case, and I will tell you why:" (R. 578.)

* * *

The only semblance of an objection made by defense counsel was that related to Government counsel's reference to defendant's alleged irresponsibility in raising his children. Government counsel stated:

> "What kind of a man are you dealing with? What kind of a man do you have before you here today?
>
> "You have a man that says, 'I believe in bringing up my children the old-fashioned way,' and the 'old-fashioned way', ladies and gentlemen, is to expose them to marihuana, expose them to these other drugs that he has no right to dispense. And that is what we have here.
>
> "Is that irresponsibility?
>
> "I can think of no—no other situation that it can be more irresponsible.
>
> "Mr. Fitzgibbon: If your Honor please. I thought on the question of religion we weren't going to talk on it.
>
> "The Court: Religion?
>
> "Mr. Fitzgibbon: The right to bring up our children. (R. 581, 582.)

The matter was not further pursued by Mr. Fitzgibbon, defense counsel.

Government counsel also stated:

> "But what does he do when he is finally exposed and they find out about it?
>
> "He makes a joke about it. Now, I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself, and I hope that you will forgive me." (R. 585, 586.)

No error is seen in the reference in argument of government counsel to the witness, Cutler, that "there is no reason to disbelieve this man—no motivation for him to falsify or no bad feelings toward Dr. Leary." We discuss the credibility of Cutler and the attempt to impeach him later in this opinion.

Appendix A

The record discloses that no objection to the remarks of the prosecution was made by the several defense counsel either during or after the argument. The issue was, therefore, waived at the time of trial by the defense. See *Fogarty* v. *United States*, 5 Cir., 1959, 263 F. 2d 201, cert. den. 360 U.S. 919, 79 S. Ct. 1437, 3 L. Ed. 2d 1534; *Van Nattan* v. *United States*, 10 Cir., 1966,, 357 F. 2d 161; *United States* v. *Sawyer*, 4 Cir., 1965, 347 F. 2d 372; *United States* v. *Aadal*, 2 Cir., 1966, 368 F. 2d 962.

Judging the case from the viewpoint that most of the evidence which incriminated the accused was admitted and confirmed by him, some resort to emphatic and forceful expression by Government counsel was to be expected. Though the court declined to give the specific charge to the jury requested by appellant that it should acquit appellant if it found his religious claims to be honest and in good faith, it nevertheless permitted Dr. Leary to present his claims fully with reference to his religious and scientific beliefs and to support them with corroborating witnesses. The sincerity of the accused was undoubtedly at issue, and especially his credibility with reference to the possession of marihuana while the defendant was crossing the international border at Laredo. We discern no personal hostility by the prosecution toward the defendant. Though Government counsel's summation of the case at times was strong, a fair reading of the entire argument, taken with the strong evidence of the defendant's guilt largely shown by his own admissions, does not convince us that there was plain error or abuse which affected defendant's substantial right to a fair trial or would justify reversal. Fed. R. Crim. P., Rule 52. That the defendant's teenage daughter was exposed to a home where the free use of marihuana by the family and inhabitants of the household (said to be for religious and scientific purposes) was regular, even routine—but nevertheless in violation of the laws of the country—also permitted the prosecutor more leeway in final argument than might be expected under ordinary circum-

stances, and we are unable to say that zeal overcame fairness.[14]

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[14] The following excerpt from the testimony while Dr. Leary was being interrogated by his counsel (Mr. Fitzgibbon) rather clearly indicates the common use of marihuana in the home and by the family of Dr. Leary:

"Q (By Mr. Fitzgibbon) Now, at home in Millbrook you stated that you used marihuana in the practice of your religion. Do members of your family share this practice and belief with you? A You mean do they smoke marihuaana?

"Q Yes.

"The Court: It that what you are asking him?

"Mr. Fitzgibbon: No, sir. If your Honor please—strike that.

"Q (By Mr. Fitzgibbon) I just have one question about your family here.

Does marihuana play an integral part in your family life in the bringing up of your children—in the raising of your children? Just answer that yes or no. A. Well, the use of psychedelic drugs does.

* * *

"The Court: Well, I believe he may explain. He is apparently having some difficulty making a categorical answer.

"A. (Continuing) You see, I can't explain why it's difficult for me to answer because—

"The Court: I think counsel is interested in the part marihuana plays in your family life.

Is that what you are asking him?

"Mr. Fitzgibbon: Yes, your Honor.

"The Court: You may tell us if yow wish.

"Q (By Mr. Fitzgibbon) We have discussed the science, we have discussed the religion and we have discussed the family. Now, the family life— A Well, I would like to try to make —use two or three sentences to do this, because I am talking about a period of over six years in which the use of marihuana has been somewhat recent.

"Q. Yes, sir. A. Since 1960, since I started working through these experiences, most of the experiences that I was involved in were in my own home. The door of my home has never been locked and no room in my home has ever been locked. Hundreds and hundreds of psychedelic planned drug sessions have been run

Appendix A

Defense counsel attempting to impeach a Government witness, Cutler, who testified on direct examination that he

in my home. My children have always lived with me in my home. From the very beginning of this work I felt that this was a natural, personal, if you will, sacred experience that was not to be secret or behind doors. I couldn't bring—I had to have this—my children be open to this, to see what was going on. My children have walked in the room during perhaps hundreds of psychedelic drug sessions with religious leaders and with philosophers and so forth, in my home.

When we were in Mexico on two occasions, we were doing research with primitive people. My children were with me. So that the use of psychedelic drugs is—and the discussion and the debates about how to use them—this is going on 24 hours a day in my home, so that the integral, central, almost exclusive part of our home life is centered on these spiritual and psychological activities.

"The Court: If I understand you, then, your children have observed and seen what is going on but have not participated? Is that a fair statement?

"The Witness: Yes, sir.

And I also wanted to make the point that marihuana was of a more recent addition and played a minor, but real part, in the last year.

"Q (By Mr. Fitzgibbon) you then think it's an important part of your role as a father to expose, I might say—use the term 'expose' your children to these scientific, psychedelic experiences? A. Yes, sir.

"Q . . . And let them see how religion is carried on in their home? A. Not just religion. It's a way of life. I am very old fashioned about bringing up children. I think that it's the home that determines the child, that the idea of sending your child out to some strangers to be educated—I believe the child should learn his father's trade, if possible or if he wants to, and that he should learn—both the religious and the philosophic and the way of life of his parents so that—

"Q Well, do you believe, then, that every person should have a right to raise their children as they believe? I think that is one of the inalienable rights, not only of our Government but a God-given right to raise your children as best your conscience and your ignorance or wisdom has led you to believe.

"Q The way that you are raising your children at the present time, do you believe that you are raising them according to your beliefs, that you have a right to do so? A I do." (R. 305-309).

had attended a social gathering at Greenwich Village; that Dr. Leary had smoked marihuana at this party, which event occurred prior to the time which Dr. Leary admitted first using the drug. On cross-examination, counsel for the defense asked the witness, "How many times have you been picked up for smoking marihuana?" The question was an attempt to establish a criminal record of the witness and admittedly was asked to impeach his credibility.[15] The court properly sustained Government counsel's objection. Generally, only prior convictions of felonies or of misdemeanors involving moral turpitude are admissible in evidence for the purpose of impeachment of the credibility of a witness. *Roberson* v. *United States*, 5 Cir., 1957, 249 F. 2d 737; *Ramirez* v. *United States*, 9 Cir., 1961, 294 F. 2d 277; *Homan* v. *United States*, 8 Cir., 1960, 279 F. 2d 767,

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[15] The record reveals the cross-examination by Mr. Fitzgibbon for the defense of the witness, Cutler, on this issue as follows:

"And, of course, you were paid by the Government to come down here, were you not? A I wasn't paid by the Government to come down here. My expenses were paid, yes.

"Q Well, it's somewhat of an equivocation. Your expenses were paid to come down? A Yes. But I am receiving no salary or anything like that.

"Q You receive a certain amount of money per day, do you not? A Yes. I believe so.

"Q So you are being paid, then?

Now, what—how many times have you been picked up for smoking marihuana?

"Mr. Susman: We object to that, your Honor.

"The Court: Are you undertaking to impeach the credibility of the witness? If you are, you may prove it by a prior conviction of felony.

"Mr. Fitzgibbon: Yes, your Honor.

"Q (By Mr. Fitzgibbon) Have you been convicted of a felony in this state or any other state? A No. I have not.

"Q You have not?

"Mr. Fitzgibbon: Pass the witness." (R. 461, 462.)

cert. den. 364 U.S. 866, 81 S. Ct. 110 5 L. Ed. 2d 88 (1960); *Beasley* v. *United States*, D.C. Cir., 1954, 218 F. 2d 366, cert. den. 349 U.S. 907, 75 S. Ct. 584, 99 L. Ed. 1243 (1955); *United States* v. *Bell*, 6 Cir., 1965, 351 F. 2d 868. The trial court has wide discretion to limit cross-examination, *Roberson* v. *United States*, *supra*, and the exercise of such discretion should not be interfered with in the absence of a showing of prejudice to the defendant. *Alderman* v. *United States*, 5 Cir., 1929, 31 F. 2d 499; *Foster* v. *United States*, 10 Cir., 1960, 282 F. 2d 222. We ascribe no prejudice to the court's ruling. The jury was free to accept or reject the witness' testimony on this peripheral issue and was so instructed by the court. Cutler was not a major witness, though he was used by the prosecution on rebuttal to impeach Dr. Leary's testimony as to when he first began using marihuana. It is most unlikely that Cutler's statement had any substantial effect on the verdict in view of the defendant's own testimony that he frequently used marihuana, knowing it to be illegal, even if such use was purportedly for scientific or religious purposes.

Now, for the first time, on appeal, appellant states that Cutler was, at the time of trial when he testified, under indictment in the United States Court, Southern District of California, for smuggling marihuana into the United States from Mexico, and for bail jumping in connection with this charge; that this fact was known to the Government and not disclosed to Dr. Leary's counsel. The Government's answer is that Cutler had no prior convictions, had not been tried as yet on the California federal cases, and that if defense counsel had asked for this information it would have been given. We observe that the pending charges against Cutler are in no way connected with the present case, and that no attempt was made by counsel at the trial to go into any relationship between the witness and the

prosecution which might have reflected on his credibility, except to show that the Government paid his expenses to come to Laredo to testify. There was obviously no suppression by the Government of Cutler's criminal record for there were no convictions against him when he testified, nor did the pending cases in California relate in any way to the present prosecution. The contention is without merit.

Appellant contends that the presumption under 21 U.S.C. § 176a, that marihuana is illegally imported and that a possessor has knowledge of illegal importation, is arbitrary and irrational in view of his contention that a high proportion of marihuana in the United States is domestically grown. To prove his point he has compiled certain statistics in published annual reports of the Bureau of Narcotics, 1957-1964, inclusive. This proof was not offered at the trial of the case and we assume we are asked to take judicial cognizance of information found in these public reports. By process of reasoning, appellant's counsel states that of all the marihuana in the United States well over 99 percent has been domestically grown. Of course, the Bureau of Narcotics reports make no such statement and we are not impressed that it is correct. Obviously the information found in appellant's brief is incomplete for undoubtedly much marihuana from outside the United States does reach this country. Appellant does not purport to tell us what this amount is or to estimate it beyond his own rationalization of certain statistics he has assembled from published reports. No reference is made to seizures by state authorities nor is any provision suggested for the amount of marihuana which comes into the United States undetected. In other published reports which are equally available to the Court as are the Bureau of Narcotics annual reports relied on by appellant, United States Commissioner of Narcotics, Henry L. Giordano, testified before the House of Representatives Subcom-

mittee of the Committee on Appropriations, on February 8, 1967, that "most of our marihuana comes from Mexico."[16] This official statement, which is in direct contradiction to the conclusions in exhibits prepared by appellant's counsel, shows rather well that appellant's information, submitted for the first time on brief, and not the subject of proof contradictorily at trial, is neither complete nor convincing.

In *Caudillo* v. *United States*, 9 Cir., 1958, 253 F. 2d 513, the Ninth Circuit upheld the constitutionality of the presumption in 21 U.S.C. § 176a, that marihuana is illegally imported and the possessor has knowledge of importation.[17] The court noted the necessity under the requirements of *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L.

[16] See Extracts from Treasury-Post Office Departments and Executive Office Appropriations for 1968, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 90th Cong., 1st Sess., p. 457, testimony of Mr. Giordano: "One of the problems, of course, is that most of our marihuana comes from Mexico. It is quite easy to smuggle it across the border and distribute it."

See also statement of Mr. Giordano, United States Commissioner of Narcotics at Hearings of the Special Senate Subcommittee on Narcotics of the Committee on the Judiciary, June 14, 1966, relative to the Narcotic Rehabilitation Act of 1966, in pertinent part as follows: "Large quantities of marihuana grown illicitly in Mexico are smuggled across the border into the United States. Although marihuana grown in the United States is occasionally found in the traffic, the Mexican variety, preferred by users, is most prevalent in the United States marihuana traffic."

[17] See also *Borne v. United States*, 5 Cir., 1964, 332 F. 2d 565; *Claypole v. United States*, 9 Cir., 1960, 280 F. 2d 768; Brown, *The Constitutionality of Statutory Criminal Presumptions, Modern Practice Commentator*, Vol. V, No. 1, p. 92, May 1967. Cf. *Maltos-Roque v. United States*, No. 23995, 5 Cir., decided July 12, 1967, . . . F. 2d. . . .

Ed. 1519 (1943), of rational connection between the facts proved and the ultimate fact presumed, and said:

> "Though there might be differences of opinion, it can reasonably be argued that the facts of marihuana importation are so well-known, particularly to marihuana users, that there is a 'rational connection between the fact proved and the ultimate fact presumed.' "

The Ninth Circuit in *Caudillo* also pointed out, "The statutory language in question has long existed in the narcotic laws" and was upheld by the Supreme Court in *Yee Hem* v. *United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925), in reference to opium. The court said that as to marihuana, "If experience is the test of the validity of an inference, then the legislatively created inference in this case is well supported." 253 F. 2d at 517.

We believe, as was expressed so well in *United States* v. *Gainey*, 380, U.S. 63, 67, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965):

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."

That being true, and with the benefit of the legislative history to which we have already referred, it is clear that the experience of Congress shows that it is gravely concerned with the smuggling, transportation, concealment and possession of imported marihuana. When Congress passed the Marihuana Tax Act of 1937 from which are derived

certain provisions of the United States Code involved here, i. e., 26 U.S.C. §§ 4741, 4742, and 4744, extensive Congressional hearings preceded the passage of the Act. They are referred to in appellant's brief as Hearings before the Committee on Ways and Means, 75th Cong., 1st Sess., H. R. 6385 (1937). The report of the proceedings shows unmistakably that Congress intended "to discourage the current and widespread undesirable use of marihuana," and that the development of a scheme of taxation would "render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses." Witnesses referred to the "injurious effect it has upon the public health and morals of this country," especially for younger people who are attracted to it. The then Commissioner of Narcotics, Mr. Anslinger, said, "This drug is entirely the monster Hyde, the harmful effect of which cannot be measured." He pointed out that all of the states had passed laws against marihuana. Numerous expert witnesses referred to the dangerous nature of the drug, its effect on those who use it, to criminal episodes of terrible character which accompanied its use. The evidence was voluminous and convincing that marihuana is a serious evil to society. Thus did Congress wisely and prudently enact this law and clearly meet the "compelling state interest" test imposed in *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).[18]

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[18] See also additional legislative history supporting the propriety of anti-marihuana enactments by Congress: 1956 U. S. Code, Cong. & Adm. News, p. 3274, relative to the Narcotic Control Act of 1956 (when the legislative presumption was included which made the unexplained possession of marihuana by the defendant sufficient evidence for conviction); 1951 U.S. Code, Cong. & Adm. News, p. 2602, in which the Narcotic Drugs Import & Export Act and the Internal Revenue laws relative to narcotics was amended in order to provide greater uniformity of penalties for violations of those laws.

Appendix A

Appellant contends that 26 U.S.C. § 4741(a), which imposes a tax on all transfers of marihuana, and 26 U.S.C. § 4742, which requires that such transfers be accompanied by written order forms issued by the Secretary of the Treasury, are unconstitutional in that they violate the Fifth Amendment privilege against compulsory self-incrimination. He argues, therefore, that his conviction under Count 3, which charged that defendant transported and concealed marihuana, being a transferee required to pay a transfer tax, in violation of 26 U.S.C. § 4744(a), is invalid. This Circuit has had occasion to rule on this precise point in *Haynes* v. *United States*, 5 Cir., 1964, 339 F. 2d 30, cert. den. 380 U. S. 924, 85 S. Ct. 926 (1965), in which the court found no merit to the contention "that the appellant was required to incriminate himself by registration and payment of taxes and, hence, that the statutes under which he was convicted are unconstitutional. . . ."[19]

We find, without merit, appellant's final point of error that the District Court erred in refusing to instruct the

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[19] See also *Rule v. United States*, 5 Cir., 1966, 362 F. 2d 215, which upheld the constitutionality of 21 U.S.C. § 176a against an attack that the statute violated the Fifth Amendment privilege against self-incrimination; *Manning v. United States*, 5 Cir., 1960, 274 F 2d 926, which upheld the constitutionality of the presumption in 26 U.S.C. § 4744(a) of guilt in failing to pay the transfer tax on marihuana (which presumption arises from failure to produce the required order forms) against an attack that due process had been violated; *Palma v. United States*, 5 Cir., 1958, 261 F. 2d 93, which upheld the constitutionality of 18 U.S.C. § 1407—which statute requires that a United States citizen, who has been convicted of violating a narcotics law under certain circumstances, register prior to departure from or entry into the United States—against attacks of unreasonable search and seizure under the Fourth Amendment, self-incrimination, lack of due process, vague and indefinite standards and restraint of civil liberty, under the Fifth Amendment, and cruel and unusual punishment under the Eighth Amendment; and *Reyes v. United States*, 9 Cir., 1958, 258 F. 2d 774, which upheld the constitutionality of the same statute, 18 U.S.C. § 1407.

jury that they could consider as a defense to Count 2 defendant's honest and sincere belief that he had a right to possess marihuana in violation of the law because of his religious and scientific beliefs. Appellant argues that the jury could have found, if so instructed by the court, that this belief negated the specific intent necessary under 21 U.S.C. § 176a. This point is in effect substantially similar to those contentions of appellant which we have already considered and rejected relating to the defense of religious claims that appellant was honest and in good faith in his use of marihuana, and to the contention that the presumption in Section 176a that possession of marihuana is sufficent evidence to authorize conviction unless explained by the defendant to the satisfaction of the jury is unconstitutional.

AFFIRMED.

APPENDIX B

Opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

(March 29, 1968)

ON PETITION FOR REHEARING EN BANC

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

Appendix B

In a supplementary petition for rehearing, appellant calls attention to three recent Supreme Court decisions rendered on January 29, 1968 (subsequent to our original opinion in this case, 383 F. 2d 851), in *Marchetti v. United States*, — U.S. —, — S. Ct. —; *Grosso v. United States*, — U.S. —, — S. Ct. —; and *Haynes v. United States*, — U.S. —, — S. Ct. —, and makes the contention that because of these holdings his conviction must be reversed on Count 3 of the indictment, which charged the transportation of marihuana as a transferee without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury required by statute. See 26 U.S.C. §§ 4741(a), 4742, 4744(a). Appellant's position is that the statutory provisions referred to violate the Fifth Amendment privilege against self-incrimination, and that though this contention was rejected by us in our original opinion, the new rulings of the Supreme Court in *Marchetti*, *Grosso* and *Haynes* now compel a holding that the conviction on Count 3 is invalid because it is based on unconstitutional statutory provisions. From this it is contended that the arguments made and charge to the jury relating to Count 3 matters have necessarily prejudiced appellant's entire case, including his defense to Count 2, which charged a violation of 21 U.S.C. § 176a in transporting and facilitating the transportation and concealment of marihuana.

The Supreme Court set aside the conviction in *Marchetti*, which charged violations of the Federal Wagering Tax Statutes for evading payment of the annual occupational tax imposed by 26 U.S.C. § 4411 and for wilfully failing to register before engaging in the business of accepting wagers, as required by 26 U.S.C. § 4412. In *Grosso*, the conviction for wilful failure to pay the excise tax on wagering imposed by 26 U.S.C. § 4401, and for failure to pay the special occupational tax imposed by 26 U.S.C. § 4411, was reversed. In *Haynes*, the conviction for

violating 26 U.S.C. § 5851 in knowingly possessing a firearm, as defined by 26 U.S.C. § 5848(1), which had not been registered with the Secretary of the Treasury, as required by 26 U.S.C. § 5841, was reversed.

Appellant thus contends that these new Supreme Court decisions now require a reversal of the Count 3 conviction in that the appellant's transportation of marihuana, without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury, is analogous to the statutory provisions relative to possessing an unregistered firearm referred to in *Haynes*, and to the statutory provisions relating to registration and occupational tax in connection with wagering activities referred to in *Marchetti* and *Grosso*. Appellant argues that the federal statutory provisions relating to marihuana, of which he stands convicted, thus penalize an individual's refusal so to incriminate himself.

We disagree with appellant's contentions because we believe the holdings in *Marchetti*, *Grosso* and *Haynes* are clearly distinguishable from the instant case.

The United States points out in its response to appellant's supplementary petition for rehearing that the statutes involved in the new Supreme Court cases differ from the marihuana statutes here in that under the former there are no licensing provisions and activities thereunder are always unlawful. The possession of marihuana, however, is not per se a crime. Under the law of Texas where the crime was committed, marihuana may be lawfully possessed under the law of that state by pharmacists, physicians and others. See Vernon's Texas Penal Code Art. 725b. The same is true under federal statutes where marihuana may be lawfully possessed. See 26 U.S.C. §§ 4741-4757 and 4771-4775. See also *United States v. Sanchez*, 340 U.S. 42, 71 S. Ct. 108 (1950).

In *Marchetti*, the Supreme Court also said (— U.S. —):

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally im-

permissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes."

Here, appellant took the stand and affirmatively waived the privilege against self-incrimination by testifying fully to the details of his acquisition and transportation of marihuana without having paid the tax or having secured the Treasury written order forms.

We reaffirm our prior ruling on this issue (based on several former decisions of this Court, namely, *Haynes v. United States,* 5 Cir., 1964, 339 F. 2d 30, cert. denied, 380 U.S. 924, 85 S. Ct. 926 (1965); *Rule v. United States,* 5 Cir., 1966, 362 F. 2d 215; and *Manning v. United States,* 5 Cir., 1960, 274 F. 2d 926) that the statutory provisions relating to marihuana (26 U.S.C. §§ 4741(a), 4742 and 4744(a)) which require that transfers of marihuana be accompanied by written order forms issued by the Secretary of the Treasury, in payment of the transfer tax, are not unconstitutionally violative of the Fifth Amendment privilege against compulsory self-incrimination.

Appellant's other contentions in his petition for rehearing have been fully considered and are amply discussed and disposed of in our original opinion.

Rehearing DENIED; rehearing en banc DENIED.

APPENDIX C

Judgment of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1966

No. 23570

D. C. Docket No. 66-L-37 Cr.

TIMOTHY LEARY,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

September 29, 1967

Issued as Mandate: April 8, 1968

APPENDIX D

Order of the United States Supreme Court Granting Certiorari

UNITED STATES SUPREME COURT

OCTOBER TERM, 1967

No. 1365

TIMOTHY F. LEARY

Appellant,

VERSUS

UNITED STATES OF AMERICA

Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The petition for a writ of certiorari is granted limited to Questions 1 and 4, presented by the petition which read as follows:

I. Whether the registration and tax provisions in 26 U.S.C. Sections 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *U.S.*, 390 U.S. 39 (1968); *Grosso* v. *U.S.*, 390 U.S. 62 (1968); and *Haynes* v. *U.S.*, 390 U.S. 85 (1968).

IV. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof.

The case is placed on the summary calendar.

June 10, 1968

APPENDIX E

Constitutional, Statutory and Regulatory Provisions Involved

A. Constitutional Provisions:

Amendment V to the Constitution of the United States of America:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Statutory Provisions:

§ 176a. SMUGGLING OF MARIHUANA; PENALTIES; EVIDENCE; DEFINITION OF MARIHUANA

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense

(as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

§ 4741. IMPOSITION OF TAX

(a) *Rate.*—There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) *Transfers to special taxpayers.*—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) *Transfers to others.*—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) *By whom paid.*—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

Appendix E

§ 4742. ORDER FORMS

(a) *General requirement.*—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) *Exceptions.*—Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply—

(1) *Professional practice.*—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: *Provided,* That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) *Prescriptions.*—To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practioner registered under section 4753: *Provided,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who issues the same: *Provided further,* That such dealer shall preserve such prescription for a period

of 2 years from the day on which such prescription is filled, so as to be readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) *Exportation.*—To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) *Government and state officials.*—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Territorial, District, county, or municipal or insular hospitals or prisons.

(5) *Certain seeds.*—To a transfer of any seeds of the plant Cannabis sativa L. to any person registered under section 4753.

(c) *Supply.*—The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such

forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

(d) *Preservation.*—Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inpection by any officer or employee mentioned in section 4773. The second copy shall be preserved in the records of the internal revenue district.

(e) *Exemption of certain transfers to millers.*—Nothing in the section shall apply to a transfer of the plant Cannabis sativa L. or any parts thereof from any person registered under section 4753 to a person who is also registered under section 4753 as a taxpayer required to pay the tax imposed by paragraph (6) of section 4711 Aug. 16, 1954, c. 736, 68A Stat. 560.

§ 4743. Affixing of stamps

The stamps provided in section 4771(a)(1) for marihuana shall be affixed by the Secretary or his delegate to the original order form. Aug. 16, 1954, c. 736, 68A Stat. 562.

Appendix E

§ 4744. UNLAWFUL POSSESSION

(a) *Persons in general.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

(b) *Government and state officials.*—No liability shall be imposed by virtue of this section upon any duly authorized officer of the Treasury Department engaged in the enforcement of this part, or upon any duly authorized officer of any State, or Territory, or of any political subdivision thereof, or the District of Columbia, or of any insular possession of the United States, who shall be engaged in the enforcement of any law or municipal ordinance dealing with the production, sale, prescribing, dispensing, dealing in, or distributing of marihuana.

§ 4751. IMPOSITION OF TAX

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities, and thereafter on or be-

fore July 1 of each year, pay the following special taxes respectively:

(1) *Importers, manufacturers, and compounders.*—Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) *Producers.*—Producers of marihuana (except those included within paragraph (4)), $1 a year, or fraction thereof, during which they engage in such activity;

(3) *Physicians, dentists, veterinary surgeons, and other practitioners.*—Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities;

(4) *Persons engaged in research, instruction, or analysis.*—Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) *Persons not otherwise taxed.*—Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year: *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by

him without further payment of the tax imposed by this section;

(6) *Millers.*—Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

§ 4752. COMPUTATION AND LIABILITY FOR TAX

(a) *Computation of tax.*—Where a tax under paragraph (1) or (5) of section 4751 is payable on July 1 of any year it shall be computed for 1 year; where any such tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(b) *Liability in case of activities in more than one place.*—In the event that any person subject to a tax imposed by section 4751 engages in any of the activities enumerated in such section at more than one place, such person shall pay the tax with respect to each such place.

(c) *Liability in case of more than one activity by same person at same time.*—Except as otherwise provided, whenever more than one of the activities enumerated in section 4751 is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed. Aug. 16, 1954, c. 736, 68A Stat. 563.

§ 4753. REGISTRATION

(a) *In general.*—Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

(b) *Special requirements for millers.*—The Secretary or his delegate shall not permit the registration of any person under this section as a person required to pay the tax imposed by paragraph (6) of section 4751, unless in the opinion of the Secretary or his delegate such person (or if a corporation, each officer thereof) is a person of good moral character and unless in the opinion of the Secretary or his delegate such person is a person of suitable financial standing, intends to engage in good faith in the business of manufacturing or producing fiber or fiber products from the plant Cannabis sativa L. on a commercial basis, and is not seeking registration under this section for the purpose of facilitating the unlawful diversion of marihuana. Any person who is registered under this section and has paid the tax imposed by paragraph (6) of section 4751 shall afford officers and employees designated by the Secretary or his delegate ready access at all times to any part of the premises of the mill or other premises of such person and the right to inspect any and all books, papers, records, or documents connected with the activities of such person in dealing in, manufacturing, and processing Cannabis sativa L. and fiber or fiber products thereof, and the handling of marihuana. The Secretary or his delegate may cancel or may refuse to renew, after notice and opportunity for hearing, the registration of any such person if he finds that such person has not complied or is not complying with the requirements of this subsection, or if he finds that grounds exist which would justify the refusal to permit the original registration of such person under this section. Aug. 16, 1954, c. 736, 68A Stat. 564.

§ 4754. Returns

(a) *Registrants.*—Any person who shall be registered under the provisions of section 4753 with the Secretary or his delegate shall, whenever required to do so by the Secretary or his delegate, render a true and correct statement or return, verified by affidavits, setting forth the quantity

of marihuana received or harvested by him during such period immediately preceding the demand of the Secretary or his delegate, not exceeding 3 months, as the Secretary or his delegate may fix and determine. If such person is not solely a producer, he shall set forth in such statement or return the names of the persons from whom said marihuana was received, the quantity in each instance received from such persons, and the date when received.

§ 4755. Unlawful Acts in Case of Failure to Register and Pay Special Tax

(a) *Trafficking.*—

(1) *Liability.*—It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax.

(2) *Enforcement of liability.*—In any suit or proceeding to enforce the liability imposed by this section or sections 4751 to 4753, inclusive, if proof is made that marihuana was at any time growing upon land under the control of the defendant, such proof shall be presumptive evidence that at such time the defendant was a producer and liable under this section as well as under sections 4751 to 4753, inclusive.

(b) *Transportation.*—Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any insular possession of the United States, or from any State, Territory, the District of Columbia, or any insular possession of the United States into any other State, Territory, the District

of Columbia, or insular possession of the United States. Nothing contained in this subsection shall apply—

(1) to any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive;

(2) to any common carrier engaged in transporting marihuana;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) to any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753 and employed to prescribe for the particular patient receiving such marihuana;

(5) to any person carrying marihuana which has been obtained by the person from a registered dealer in pursuance of a written prescription referred to in section 4742(b) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, if the bottle or other container in which such marihuana is carried bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying marihuana which has been obtained by the person as a patient from a registered physician, dentist, or other practitioner in the course of his professional practice if such marihuana

is dispensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

§ 4773. INSPECTION OF RETURNS, ORDER FORMS, AND PRESCRIPTIONS

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705(c) (2) and (e), and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732 (b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said statements or returns filed in the office of the official in charge of the internal revenue district, upon the payment of a fee of $1 for each 100 words or fraction thereof in the

copy or copies so requested. Aug. 16, 1954, c. 736, 68A Stat. 567; Aug. 31, 1954, c. 1147, § 9, 68 Stat. 1004.

§ 4775. LIST OF SPECIAL TAXPAYERS

The Secretary or any officer or employee designated by him is authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702(a), section 4751, or section 4752, upon payment of a fee of $1 for each 100 names or fraction thereof in the copy so requested. Aug. 16, 1954, c. 736, 68A Stat. 568.

C. Regulatory Provisions:

26 C.F.R. 152.61 provides:
Scope of tax.

Except as otherwise provided, each transfer of marihuana to a person within the United States is subject to tax, to be paid in the manner hereinafter indicated. The tax is due whether the transferor be located within the United States or elsewhere. The tax applies to every transfer, no matter how often the same material may be transferred. It is no basis of exemption that a transferred article was produced from material on the transfer of which tax was paid.

26 C.F.R. 152.62 provides:
Amount of tax.

Where the transfer is to a taxable person who has duly registered and paid special tax, the transfer tax is at the rate of $1 per ounce or fraction thereof. If the transfer is to a person who has not registered and paid the special tax under this act, tax at the rate of $100 per ounce or fraction thereof is due.

Appendix E

26 C.F.R. 152.63 provides:
Method of payment.

The tax is paid by attachment of adhesive stamps to order forms as hereinafter shown. Stamps of various denominations are available. Payment for the stamps shall be made when application for the order form is submitted.

26 C.F.R. 152.64 provides:
Affixing and canceling of stamps.

The proper stamp, evidencing the payment of the transfer tax, shall be affixed to the original order form by the district director or his representative, and the person so affixing the stamp shall cancel it by writing or stamping thereon, in ink, his initials, and the day, month, and year, or shall, by cutting with a machine or punch affix his initials and the date as aforesaid, in such manner as to render it unfit for reuse. The cancellation shall not so deface the stamp as to prevent its denomination and genuineness from being readily determined.

26 C.F.R. 152.65 provides:
Reuse of stamps prohibited.

A stamp once affixed to one order form cannot lawfully be removed and affixed to another. As to refunds for amounts paid for stamps, see § 152.124.

26 C.F.R. 152.66 provides:
Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's

name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152.62), plus 2 cents in payment for the order form.

26 C.F.R. 152.67 provides::
Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign applications for order forms, and shall affirm that the signature as shown is his signature.

26 C.F.R. 152.68 provides:
Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

APPENDIX F

Portions of The Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

(LAREDO DIVISION)

Criminal No. 66-L-37

RELEVANT DOCKET ENTRIES

2/ 1/66	Indictment filed. (Returned at the Houston Division)
3/ 1/66	Deft. Timothy Leary's motion for bill of particulars filed duplicate (MD 3/7/66).
3/ 1/66	Government's answer to motion of deft. Timothy Leary for bill of particulars filed duplicate.
3/ 3/66	Deft. Timothy Leary's motion for bill of particulars filed duplicate.
3/ 7/66	(BCC) Order denying all pending motions entered.
3/ 9/66	Motion of deft. Timothy Leary to quash contents in the indictment filed duplicate.
3/ 9/66	Motion of deft. Timothy Leary to dismiss the indictment filed duplicate.
3/ 9/66	(BCC) Order first day's hearing entered (evidence begun before the court as to deft. Susan Leary and before the court and jury as to deft. Timothy Leary. Govt. rested).
3/ 9/66	(BCC) Order denying oral motion of deft. Timothy Leary for judgment of acquittal entered.
3/10/66	(BCC) Order 2nd day's hearing entered. (Defendants' evidence resumed; and concluded, except for expert witnesses.)
3/10/66	Requested instructions to the jury of deft. Timothy Leary filed.
3/11/66	Requested instructions as to the jury of deft. Timothy Leary filed.

Appendix F

3/11/66 (BCC) Order 3rd and last day's hearing entered. (Oral motion of deft. Timothy Leary for judgment of acquittal made. Deft. Susan Leary adopted the same motion. Argument of counsel. Charge of the court.)

3/11/66 (BCC) Order dismissing ct. 1 as to deft. Timothy Leary on the court's own motion entered. Cts. 2 and 3 only submitted to the jury.

3/11/66 Jury verdict received and filed. (Deft. Timothy Leary found guilty as charged on cts. 2 and 3.)

3/11/66 (BCC) Sentence as to deft. Timothy Leary: Committed under section 4208(B) T-18, USCA for examination, etc. on ct. 2: 20 years to serve and fine of $20,000.00. to be paid. (Deft. to remain on the same bond pending notification where to report.)

3/16/66 Deft. Timothy Leary's motion for a new trial filed duplicate.

3/18/66 (BCC) Order that deft. Timothy Leary surrender himself to U.S. Marshal filed and entered.

3/18/66 (BCC) Order overruling motion for a new trial, deft. Timothy Leary, filed and entered.

3/18/66 (BCC) Judgment and commitment, deft. Timothy Leary, filed and entered.

3/18/66 Notice of appeal, deft. Timothy Leary, filed duplicate.

3/22/66 Copies of notices of appeal and statement of docket entries mailed to Clerk, U.S. Court of Appeals, New Orleans, La.

3/22/66 Copies of notices of appeal mailed to U.S. Atty., Houston.

3/25/66 Appearance bond on appeal, deft. Timothy Leary, in sum of $5,000.00 (cash) filed duplicate.

4/21/66 (BCC) Certified copy of order extending time for filing record on appeal to 90 days from 3/18/66 filed and entered.

4/21/66 Original order extending time for filing record on appeal to 90 days from 3/18/66 mailed to Clerk, U.S. Court of Appeals, New Orleans, La.

Appendix F

INDICTMENT

THE GRAND JURY CHARGES:

Count One

That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY did unlawfully, knowingly, and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States, a quantity of Marihuana which should have been invoiced, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having such Marihuana invoiced, contrary to and in violation of Section 176(a), Title 21, United States Code.

Count Two

That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, hereinafter called defendants, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three (3) ounces of Marihuana (Cannabis Sativa), more or less, after importation, and the defendants then and there knew the said Marihuana to have been imported into the United States contrary to law, in violation of Section 176(a), Title 21, United States Code.

Count Three

That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, transferees, required to pay the transfer tax

imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code.

A TRUE BILL:

C. MAYLOR
Foreman of the Grand Jury

WOODROW SEALS
United States Attorney

By RONALD J. BLASK
Assistant United States Attorney

RJB:lh

TESTIMONY

A. *Testimony of Customs Inspector Herbert O. Best.*

[70] *Direct examination by Mr. Blask:*

Q. What is your name, please? A. Herbert O. Best.

Q. Mr. Best, where do you live? A. Here in Laredo, Texas.

Q. And how are you employed? A. As a U.S. Custom Inspector, Port of Laredo.

Q. How long have you been a customs inspector here in Laredo? A. Since 1962.

Q. Were you so employed and on duty in the capacity of a customs inspector on or about December 22, 1965? A. Yes, sir.

Q. Do you recall your duty hours at that time? A. I worked from 2:00 in the afternoon until 10:00 P.M.

Q. Directing your attention to the 22nd of December of 1965 and to approximately 6:30 in the evening, did you have an occasion to see the defendant, Timothy Leary? A. Yes, sir.

Q. Approximately what time of day or night was it that you saw him? [71] A. At approximately 6:45 P.M. he arrived.

Q. Now, for the purposes of the record do you see—do you see Timothy Leary in the courtroom? A. Yes, sir.

Q. Would you point him out for the jury, please? A. Dr. Leary is sitting right here facing me on my right.

Q. What brought him to your attention on that occasion, Mr. Best? A. He arrived in the secondary inspection area at Laredo—

The Court: Was he coming back from Mexico?

The Witness: Yes, sir.

The Court: All right.

A. Testimony of Customs Inspector Herbert O. Best

A. (Continuing) He arrived at the secondary inspection area at the port of Laredo, Texas, driving a vehicle.

By Mr. Blask:

Q. Where was your station that evening? A. I was assigned to baggage inspection.

Q. Is that the secondary area? A. That is in the secondary area.

Q. Had he been directed to your area by the primary station? A. He had been—the vehicle had stopped at the primary inspection station and the customs secondary ticket placed on the vehicle.

Q. Was the vehicle coming from Mexico into the United States? Yes, sir.

Q. At the time that the vehicle approached you, what did you [72] do? A. I directed him into a parking space and asked the driver to place all their baggage and merchandise on the inspection table.

Q. Who was the driver of that car? A. Timothy Leary.

Q. Do you recall—can you give us a description of the automobile? A. It was a blue Ford station wagon bearing a Connecticut license, and I believe it was a 1966 model.

Q. At the time that you asked them to unload the luggage what was said, if anything, by the driver? A. The driver?

Q. And that was Timothy Leary? A. Yes, sir.

Q. All right. What did he say to you? A. He wished to advise me, or request if it were possible not to unload all of the baggage. He explained that he had not been into the—into Mexico; they had crossed the bridge to the Mexican official station over there and had not obtained their tourist permits and car permits and that they had been advised to return at 8:00 o'clock the following morning.

A. Testimony of Customs Inspector Herbert O. Best

Q. What, if anything. did you say to them at that time? A. Well, I asked if they had anything from Mexico.

[73] Q. What— A. . . . and they said they did not.

Q. Did he answer you? A. They said they had none—nothing.

Q. Did Timothy Leary answer you, specifically? A. Yes, sir. I was questioning the driver of the vehicle.

Q. All right. He said he had nothing from Mexico? A. That's correct.

Q. O.K. did you ask him anything else? A. I asked him about how long he had been over there and he said within the hour they had crossed.

Q. Did you ask him anything else? A. Well, I asked to see the baggage. He said I could look at anything I wished. So I observed the persons in the car and then asked them to step out of the vehicle.

Q. Was there anything about the appearance of the individuals in the automobile that made you suspicious? A. Well, there was considerable baggage in the car. One occupant of the vehicle was sitting behind the second seat among the baggage.

Q. Was that a male or female? A. Male.

Q. Was there anything about his appearance that particularly attracted your attention to him? [74] A. Well, he was bearded, a rather long-haired person and possibly a beatnik appearing, and so I asked them all to step out so that I could check the vehicle and observe their persons.

Q. How many individuals were in the car at that time? A. There were five passengers.

Q. And how many males? A. Three males and two females—occupants.

Q. After they got out of the car, what, if anything, did you do at that time? A. Well, I began looking through the vehicle—the interior of the vehicle and at their baggage inside the car.

A. Testimony of Customs Inspector Herbert O. Best

Q. All right. The baggage was in the automobile at that time? A. Everything was in it. Just the people had stepped out.

Q. O.K. A. I started looking through it and I noticed some vegetable material and a seed on the floor of the car right behind the front seat.

Q. Were you able to identify that seed that you saw? A. Yes. It appeared to be—

Q. What— A. I thought it was a marihuana seed—excuse me—marihuana seed.

Q. When you found that seed what, if anything did you do [75] at that time? A. I requested permission from Supervisor Inspector Sanders to give the occupants and the car a complete search.

Q. Was that permission received? A. Yes, it was.

Q. And based upon that permission what did you then do? A. I asked the occupants to unload everything from the vehicle.

Q. And was that done? A. Yes, sir.

Q. Then what occurred? A. I again asked them if they had anything from Mexico.

Q. Did you direct it to all of the individuals or did you direct it to Timothy Leary? A. To all of them. They were outside the vehicle at that time.

Q. And what was their answer in response to their question? A. No one would declare anything from Mexico.

Q. Then what occurred? A. I asked them to come into the baggage room and asked them to have seats on the benches there.

Q. Did you escort all five of the people? A. Yes, sir.

Q. Did you see Susan Leary in the automobile? [76] A. Yes, sir.

Q. Do you see Susan Leary in the courtroom today? A. Yes, sir.

Q. Would you point her out for the purposes of the record and the jury? A. She is sitting on my left next to Timothy Leary.

Q. Behind her father? A. Yes, sir.

Q. All right. After you escorted them into the baggage room, what did you then do? A. Supervisor Sanders stayed with the occupants while I took the men, one by one, into the search room and performed a personal search on them.

Q. Is the search room on the premises at the footbridge? A. Yes, sir.

Q. Did you conduct a personal search and interview with Timothy Leary? A. Yes, sir.

Q. Did you direct a series of questions to him at the time you took him into the room? A. Yes.

Q. What did you ask him? A. First, his name.

Q. What did he say to you? A. Timothy Leary.

[77] Q. What else did you ask him? A. I asked him where he lived.

Q. What did he say in response to that? A. Millbrook, New York.

Q. Did you ask him anything further? A. I asked what his occupation was.

Q. What did he tell you to that? A. Psychologist. And I—

Q. Did you ask him anything further? A. I asked him by whom he was employed and he said that he was the director of the Castalia Foundation.

I asked the nature of it. He said, "It's a research foundation."

Q. Did you ask him anything else? A. I asked him where he was born, his date of birth.

Q. Did he give you answers to those questions? A. Yes, he did.

Q. Then what occurred? A. I asked him to empty his pockets on the table and he did that.

A. Testimony of Customs Inspector Herbert O. Best

Then I had him remove his clothing to see if he had anything on his person.

Q. Did you find any contraband on his person? A. None.

Q. Did you find any contraband in his clothes? [78] A. None.

Q. Did you ask him any other questions? A. Yes. I asked him if he had any record of arrest or any criminal record.

Q. What was his response to that? A. "None."

Q. Did you ask him anything else? A. I asked him had he ever used any narcotics or marihuana.

Q. And what was his response to those questions? A. He told me he had not.

Q. Did you ask him anything else? A. I asked him what his marital status was and he told me he was married.

Q. Did that conclude your personal search and your interview of him at that time? A. Yes, sir.

Q. Who was the next person that you did interview? Do you recall? A. I believe John Leary was the second, which I performed a personal search on.

Q. Did you understand that he was the son—

Mr. Fitzgibbon: Now, if your honor please—

The Court: You may ask the question, Mr. Blask. Don't answer it please so counsel can [79] object.

By Mr. Blask:

Q. Did you interview and search John Leary? A. Yes.

The Court: Is there objection?

Mr. Fitzgibbon: Yes, if your honor please. John Leary is not on trial and the only reason that that question is being asked is to prejudice the jury, to

show that John Leary was a defendant. It's a matter of—

The Court: I would overrule the objection that the only purpose of the question was to prejudice the jury. If that is the only objection, you may answer.

Mr. Fitzgibbon: The other objection, if your honor please, is that John Leary is not on trial and it's irrelevant and immaterial.

The Court: I will overrule the objection that's it's irrelevant and immaterial. I don't know what the answer may be.

By Mr. Blask:

Q. Did you find any contraband on John Leary? A. No.

Q. How old a person would you say that that person was when [80] you first saw him and talked to him? A. Approximately 16.

Q. The other male person, did you also conduct a personal search and interview that individual? A. Yes, sir.

Q. Did you find any contraband on him? A. No.

Q. What was done with the defendant, Susan Leary? A. When I completed the personal search of the male occupants of the vehicle, I asked custom inspectress Helen Loftis to perform a personal search on the female occupants.

Q. And while that was being performed, what, if anything, did you do? A. I left supervisor inspector Sanders in the baggage room with the other occupants and I took Timothy Leary out to the vehicle and began an inspection of the vehicle.

Q. When you arrived out at the car what was the first thing that you began doing? A. Well, I asked Dr.—or,

Timothy Leary, to stand near the vehicle and I began checking further in the interior of the vehicle.

Q. Where did you look in the car? A. In the glove compartment and on the floor of the seats, initially.

[81] Q. All right. Did you find anything of an unusual nature in the glove compartment of the automobile? A. Yes. I found additional sweepings and marihuana seeds loose in the glove compartment.

Q. What did you do with what you found? A. I placed these into an envelope.

Q. Did you mark them for future identification? A. Yes, I did.

Q. Where was Timothy Leary at that time? A. He was sitting on the inspection table next to the vehicle.

Q. At the time that you found the sweepings did you ask him any questions or did he ask you anything? A. He asked me what I was doing.

Q. And what did you tell him? A. I told him that I found what I believed to be marihuana in the vehicle.

Q. Did he answer you at that time? A. He said, "Well, I know nothing about that."

And he started to—he opened the door of the car and started to take something out.

Q. Did you— A. I asked him what he was getting. He said, "I want to get a book."

Q. And did he remove a book from the automobile at that time? [82] A. Yes, he did.

Q. And what did he do then? A. He sat around and proceeded to read, and I continued the inspection of the vehicle.

Q. Was he in close proximity to the automobile while you were conducting your search at that time? A. Yes.

Q. Did you find anything else in the automobile of an unusual nature? A. I found some additional sweepings and seeds in it.

A. Testimony of Customs Inspector Herbert O. Best

Q. Marihuana seeds? A. Yes.
Q. Where did you find those? A. On the floor boards.
Q. Front or rear? A. Both.

* * *

[83] Q. What occurred next, if anything, Mr. Best? A. While I was inspecting the vehicle Miss Loftis came out to the car and showed me a silver metal box and some material—containing material which I believed to be marihuana.

Q. All right. Would you describe this little container or box that she brought out to you? A. It was approximately three inches long, rather egg-shaped or oval-shaped, and maybe two inches in depth.

Q. Did it appear to be bronze or silver or what? A. It was silver colored.

Q. All right. Did you look inside of it? A. Yes.

[84] Q. What did you see? A. A quantity of material that I believed to be marihuana. There were three partially smoked cigarettes that appeared to be marihuana cigarettes.

Q. Did you see anything else? A. . . . and four—I believe four pills or capsules.

Q. Was Timothy Leary still seated in close proximity to you at this time? A. He was by the car on the table.

Q. What did you do at this time when Miss Loftis brought this container out to you? A. She advised me she had found these on the person—

Mr. Fansler, Jr.: If your honor please. I am going to object to what she advised him. That would be hearsay.

The Court: That would be hearsay. Sustained.

A. Testimony of Customs Inspector Herbert O. Best

By Mr. Blask:

Q. Mr. Best, not what she told you, what did you do after you saw and observed that container? What did you do? A. I asked Dr. Leary to come back into the baggage room.

Q. And once you got him back in the baggage room what occurred then? A. In the presence of Mr. Sanders and Miss Loftis I advised the occupants that they were under arrest and of their [85] rights: They did not have to make any further statements; if they did, that it could be used against them.

Q. Did you direct any further questions to them at this time? A. None specifically.

Q. Who did you place under arrest? A. All of the occupants.

Q. Well, did you place Timothy Leary under arrest? A. They were all seated together on the benches.

Q. He was one of the five individuals, wasn't he, Mr. Best? A. Yes, he was.

Q. He was one of the ones you placed under arrest, wasn't he? A. That is correct.

Q. And was Susan Leary one of the individuals you placed under arrest? A. Yes, sir.

Q. The other lady occupant of the car, was she placed under arrest? A. Yes.

Q. And John Leary was placed under arrest, wasn't he? A. Yes.

Q. And the other individual you described as the Beatnik, was he placed under arrest? A. Yes.

B. Testimony of Customs Inspectress Helen M. Loftis

B. Testimony of Customs Inspectress Helen M. Loftis

[106] *Direct examination by Mr. Blask:*

Q. What is your name? A. Helen M. Loftis.

Q. Miss Loftis, where do you live? A. I lived in Laredo, Texas.

Q. And how are you employed? A. I am a U.S. Customs Inspectress at the Port of Laredo, Texas.

Q. How long have you been a customs inspectress? A. Nine years.

Q. Were you so employed and on duty on the evening of December 22 of 1965? A. I was.

Q. Do you recall your duty hours? A. I worked from 4:00 P.M., in the afternoon, until midnight.

Q. Directing your attention to that particular day and to around 7:00 o'clock in the evening, was your attention directed to an individual by the name of Susan Leary? A. Yes, it was.

Q. Now, for the purposes of identification, do you see that [107] individual in the courtroom today? A. Yes. The young lady sitting here with the tan sweater.

Q. Approximately what time of evening was it that you were first attracted to her or she was brought to you? A. Around 7:15 or 7:20.

Q. Were you requested to conduct a personal search of her? A. I was.

Q. And did you do so? A. I did.

Q. Where was that conducted, Miss Loftis? A. In the room which has been set aside as a personal search room at the Port of Laredo, Texas.

Q. Do you recall, or can you tell us how she was dressed at that time? A. Well, she had on a rather loose dress.

Q. All right. At the time that you took her into the search room did you direct a series of questions to her? A. Yes, I did.

B. Testimony of Customs Inspectress Helen M. Loftis

Q. And would you tell us what those questions were? A. I asked her her name and she said her name was Susan Leary, that she was a student at the Barlowe School in Amenia, New York.

Q. Did you ask her anything else? A. Yes. I asked her who was accompanying her at the time and she told me that her father, Timothy Leary, her [108] brother, John, and a friend, Miss Woodruff, and a man by the name of Rene; but she did not know his last name.

Q. She didn't know the name of this last person? A. No.

Q. . . . or the last name of this individual? A. That's right.

Q. What else did you ask her? A. Well, I asked her if she had a criminal record and she stated she did not.

I asked her if she had ever smoked any marihuana and she said, "No." . . . and if she had ever used narcotics and she said, "No."

Q. Did you ask her anything further at that time? A. I asked her before—I asked her to remove her clothing so that I could give a personal search to see if she had—

Q. Did you ask her if she had brought anything back from Mexico? A. I asked her if she had anything on her person—anything that she had acquired in Mexico, or if she was concealing anything on her person, and she said, "No."

Q. At that time did you ask her to disrobe? A. Yes, I did.

Q. What did her clothing consist of? [109] A. She had a dress and a pair of panty briefs.

Q. And that's all. A. That's all.

Q. What happened after she disrobed, Miss Loftis? A. After she removed her dress I asked her to lower her panties and to turn around and stoop over for inspection, and at that time I saw a silver object concealed between her legs.

C. Testimony of Customs Agent Rey L. Hatch

Q. Now, was that in her panties or was it physically between her legs? A. It was physically between her legs.

Q. When you saw that item what, if anything, did you do at that time? A. I asked her what it was and to hand it to me.

Q. Did she do that? A. Yes, she did.

Q. What did—what was her answer to your question of "What was it?" A. She gave me no answer.

Q. After you took possession of it, would you describe it to us? A. It was a silver box, sort of oval-shaped. It was approximately two and a half to three inches long.

Q. Was it metal? A. It was about two inches wide. [110] Yes. Silvery metal.

Q. Did you open this little box? A. Yes, I did.

Q. And would you describe to the jury what you found inside? A. I found a green substance which appeared to be marihuana.

Q. All right. A. . . . and three partially smoked cigarettes and four capsules.

C: *Testimony of Customs Agent Rey L. Hatch*

[136] Q. What else—what did you ask him? A. I then asked him— on the bottom there was a notation that he had never—never used marihuana.

Q. I see. A. . . . and no criminal record.

I again reviewed these with him and at this time I asked him who belonged to the silver—well, this little silver box. I believe I was the first one to call it a snuffbox.

And he said it was his, that he had given it to his daughter on the way back across the bridge and had told her to get rid of it.

C. Testimony of Customs Agent Rey L. Hatch

Q. Did you ask him anything further? A. I told him to wait a minute and I called in customs port investigator Eugene Smith and asked him again about this.

Q. And what did he answer that time—the second time? A. He just told us that he had given it to Susan and had told her to get rid of it.

Q. And did you ask him anything further? A. At that time, yes, sir, I did. At that time I asked him if he had the form from the Treasury Department to transfer marihuana or to have marihuana in his possession.

Q. And did he produce one at your request? [137] A. No, sir. He did not.

Q. Did you at a later time make the same request of Susan Leary? A. Yes, sir. I did.

Q. And did she respond with such an order form? A. She made no comments at all.

Q. Did Mr. Leary say anything else to you in response to any questions that you might have propounded to him after he told you that he had given it to his daughter to get rid of? A. Yes, sir. He told customs port investigator Smith and I that he knew more about narcotics and marihuana than either one of us.

Q. I see. And did you ask him anything else? A. There was a general group of questions, whether he had leased this car or whose car it was, and just general information that we received.

Q. Did you direct any further questions to him regarding the marihuana or the contraband that you found or that was found? A. Yes, sir. He told me that he had—in the questioning he told me that he had just gone to the border area, or to the Mexican side; that he had been refused entry into Mexico and that he was told to return the next morning at 8:00 o'clock, and he didn't know why we were making [138] so much fuss about it.

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C. Testimony of Customs Agent Rey L. Hatch

[153] Q. Now, you testified this morning that the defendant said that he—anyway, the little silver snuffbox and its contents was his? A. Yes, sir.

[154] Q. . . . and that he had given it to his daughter and told her to get rid of it? A. Yes, sir.

Q. Was that substantially your testimony? A. Yes, sir. These are, I believe, his exact words: He said it was his and he handed it to her and told her to get rid of it.

Q. And when I paraphrased you that was substantially what you said this morning, was it not? A. Yes, sir.

Q. Now, Rey, did he tell you that he had been to Mexico and that they attempted to get into Mexico that evening and they were refused entry and they had to come back? A. Yes, sir. He did.

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[155] Q. Now, then, did he tell you then at that time that he knew that there was Marihuana in the automobile when it was in Mexico and that he had asked the four of the other occupants, or directed them to get rid of any marihuana that was in the automobile? A. No. He—

Q. He didn't tell you this? A. No, sir.

Q. Well, did he tell you that that marihuana was not acquired in Mexico but that it had been exported from the United States and brought into Mexico?

He did tell you that, didn't he?

A. Yes, sir. He didn't know why he was being charged with smuggling, because he said he had it with him.

Q. He said he had it with him and he—

The Court: Had it with him before he went into Mexico?

The Witness: . . . before he went into Mexico. Yes, sir.

C. Testimony of Customs Agent Rey L. Hatch

By Mr. Fitzgibbon:

Q. And did you make a note of that statement any place? I notice it's not here on your— A. Well, no, sir. Not that he had it. This was—I don't know whether he told me this directly or he had implied it that he had the marihuana in the United States.

There is a notation on the back of my search sheet of [156] Dr. Leary.

Q. There is a notation? . . . where on this? A. Yes, sir. Not on— The notation is to his being warned. Also as to—

Q. Well, the question I asked you was: Did you make any notes that the defendant had stated that he had brought marihuana from the United States into Mexico? A. No, sir. I did not.

Q. I see. Did— When he told you that did you ask him anything as to where it had come from or did you ask him— A. I believe I asked him—

Q. Did you pursue the question any farther? A. I believe I asked him where it came from, but he would not say where exactly it came from.

Q. Therefore, he was insisting that it wasn't smuggled? Is that right? A. Yes, sir. He was very insistent.

Q. You stated a moment ago that he did not tell you that while the car was in Mexico that he had told his traveling companions to get rid of the marihuana? Didn't he tell you that he did? A. He said—I believe he stated—or, he stated that he gave it to Susan and told her to get rid of it while they were on the bridge coming back into the United States.

Q. Now, you say that you believe that he said that?

[157] A. Yes, Sir. I believe so.

Q. Could it have been—this is very important—could it have been that he had intimated that; you had received that impression, or that you obtained that impression from

his conversation, but that he—that what he might have meant was that he actually told Susan to "get rid of the marihuana that was in the car before we come back to the United States"?

Mr. Blask: Your Honor, I am going to object to what might have been in the mind of the defendant.

The Court: I would sustain it. You may ask the witness what the defendant said to him, but asking him to speculate as to what he might have meant or something like that is not proper.

By Mr. Fitzgibbon:

Q. Would it be that the defendant could have told you, then, that he could have told Susan or someone else to get rid of the marihuana? A. Yes, Sir.

Q. All right. Now, did he tell you about what place on the bridge they were?

Well, let me rephrase that. Did you ask him if he knew that Susan, his daughter, had the marihuana concealed? [158] A. Yes, sir.

Q. And what did he say? A. He says—I believe he told me just that as they were coming onto the American side that Susan told him that she still had it.

Q. Just as they were coming up to the American customs? A. Yes, sir.

Q. All right. Now, I am going to show you a drawing that is large and cumbersome. Now, this—I am not going to say this is drawn to scale, although I believe it has been. But I do not have the man here that made it. A. Yes, sir.

Q. Now, I will just ask you: I will point out that this is going in the general direction of south and this is north and the States here, and this would be west and this would be east (indicating).

And here is the outbound traffic and here is the international bridge and the international boundary going over here.

C. Testimony of Custom Agent Rey L. Hatch

And I believe, if you remember, if you are going to go into Mexico you, instead of going underneath the customs house over there, the tourists would turn off to the right, would they not? A. Sometimes. If they know where to turn off. Sometimes they go up and ask the Mexican officials and then go [159] around behind.

Q. Anyway, back here is where— A. No, sir. They end up down over to the right.

I might point out that they end up in the parking area that is over here on this side—well, right up in here and here (indicating).

Q. All through here and here (indicating)? A. Yes, sir. And over in this area here (indicating).

Q. Now, I believe he told you that the car had been over there? A. Yes, sir.

Q. . . . And—sorry. And then he told—did he tell you, then, that after they were turned back—I believe you testified that they started back across the river here (indicating)? A. Yes, sir.

Q. And, of course, they were apprehended over here (indicating)? This is customs? A. Yes, sir.

Q. Now, what I am trying to find out—and if you would designate it, if you know—he stated that he knew Susan had the marihuana, but at what point did he discover that that she had the marihuana? Did he tell you that? A. No, sir.

Q. He didn't? [160] A. No, sir. I believe that just—if I remember right, he said as they were coming up to customs. I don't know whether he meant coming up here (indicating) or where they pulled in, or where. Just as they were coming up to customs.

Q. He told you, though, that he at that point—I want to get the facts. At that point, that he did know that she had the marihuana concealed? A. Yes, sir.

D. Testimony of Chemist Fred V. Eggerton

Q. Did he also tell you, Rey, that when they started out from Mexico that he did not know that she had the marihuana concealed? A. I don't know at what point he gave it to her, sir.

Q. But he did tell you that some place, as best your memory is—and I know—I know you will tell us, and I know you are a truthful man—that some place along the line, just probably before he reached the customs station, that he discovered that she had—that Tim Leary discovered that she was carrying the marihuana? A. Yes, sir. I believe that she told him that she still had it.

Q. Wait a minute. What was that last statement that you made? A. That she told her father that she still had it?

Q. She told her father she still had it? [161] A. ... she still had it.

Q. She told her father that she still had it, or she had it? A. She told her father that she had it. Yes, Sir.

* * *

D. Testimony of Chemist Fred V. Eggerton

[176] Q. All right, sir. Would you state to the court and jury the chemical contents of the white envelope marked number 1, based on your examination. A. The white envelope marked number 1 contained a metal box which contained marihuana.

Q. Was it crude marihuana or was it semi-refined marihuana, or what type of marihuana was it? A. It was in the form of semi-refined marihuana.

Q. All right. Now, was that all that was contained in the silver box was semi-refined marihuana? A. No, sir. There was three partially smoked cigarettes in a paper package in the metal box, and the cigarettes also contained marihuana. And there was also a paper package in this metal box of four capsules.

D. Testimony of Chemist Fred V. Eggerton

Q. And what did the capsules contain? A. The capsules contained detroamphetamine sulfate, which is a central nervous system stimulant, not a prohibitive narcotic.

Q. Each cigarette—is it your testimony that each cigarette contained marihuana? A. Yes, sir.

Q. And then there was semi-refined marihuana, loose, or how? A. Loose in the metal box.

[177] Q. All right, sir. Now, let's take these. That was number 1? Is that correct? A. That's correct.

Q. All right. Now, let's take envelope number 2. Tell the court and jury what envelope number 2 contained and what the analysis was. A. Envelope number 2, which had written upon it "sweepings from glove compartment and floor of automobile" also contained marihuana.

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[179] Q. Do you have the weight of the marihuana that was found to be positive—the positive weight? did you weigh the marihuana— A. The marihuana.

Q. . . . The sample? A. The marihuana in the metal box weighed about 11 grams.

Q. About what? A. Eleven grams.

Q. All right. Did you—do you have the weight of the other samples? A. I don't remember specifically. I think the sweepings from the floor mat was five grams, as well as I remember.

Q. A small amount? Is that correct? A. That's right.

[180] Mr. Susman: Pass the witness.

Cross examination by Mr. Fitzgibbon:

Q. You say in the envelope there were—I mean, in the metal box, you recall there were 11 grams? A. Loose in the metal box was a little over 11 grams.

Q. Well, is that counting everything in the lot? A. Pardon?

Q. I think you stated in the box was contained semi-refined marihuana plus three partially smoked cigarettes, which contained marihuana, and four capsules. Now, excluding the capsules in the box—you are not talking about weighing the capsules, are you? A. No, sir.

Q. Excluding the capsules do you know how much loose marihuana there was in the little box? A. A little over 11 grams.

Q. Plus the cigarettes? A. Yes, sir.

Q. And did you weigh the cigarettes? A. I don't remember specifically whether I weighed the cigarettes or not. In some instances of this nature, where the amount is relatively small, an estimation is made, and as well as I recall, the three cigarettes together weighed [181] two grains.

Q. Well, then, to the best of your recollection there was 11 grams and two *grams* on the little box? A. Eleven grams. There was a little over 11 grams. I think it was 11.11 grams of loose marihuana in the box, plus about fifteen-hundredths of a gram of marihuana in the cigarettes.

Q. Oh. Fifteen-hundredths of a gram? . . . Fifteen-hundredths? And that would be zero point fifteen-hundredths? Zero point fifteen? A. In the cigarettes.

Q. In the cigarettes? A. They were partly smoked cigarettes.

Q. Now, that is fifteen-hundredths of a gram. I have forgotten, sir. Could you tell us how many grams in an ounce? A. There are 28.35 grams in an ounce.

Q. And how many grains in a gram? A. There is 15.43 grains in one gram.

Q. . . . Grains in a gram? And to find out how many grains in an ounce you would multiply 15.3 times 28.35? A. Uh huh. Yes, sir.

E. Testimony of Petitioner Timothy F. Leary

Q. Now, since there was 11—all right. We have in the little box, then there was 11 plus— [182] I am a little bit confused now. You said there were 11.11 grams and then fifteen-hundredths of a gram? That would be just about something less than 12 grams in the metal box? A. Approximately 11 and a quarter grams altogether.

Q. Eleven and a quarter grams in the little box? I see. Now, going then into envelope number 1—No, going into envelope number 2. Number 1 was the metal box, wasn't it? A. That's right.

Q. Going into envelope number 2, "sweepings from the glove compartment contained marihuana." Can you hold that number 2? A. (Complying.)

Q. How much, in grams, would that be, or grains or— A. As well as I remember it was also an approximation, and it was about 15 grains.

Q. Fifteen grains? A. Right.

Q. I see.

The Court: Now, this is the sweepings from the the glove compartment that you—.

The Witness: This is the sweepings from the glove compartment and the floor of the automobile.

E. Testimony of Petitioner Timothy F. Leary

[313] Q. All right. Now—all right, sir. When you started out from Millbrook, New York, on this trip, did you subsequently go through Laredo? A. Yes, sir.

Q. All right. When you started out, then did you or did you not have a quantity of marihuana? A. Yes, sir.

Q. Where did you obtain the marihuana? A. That was given to me by a friend.

[328] A. Well, I knew—I knew where the bridge was, but I didn't know what the traffic situation was, and so forth.

So then we—as we came across the bridge I saw in front of me this stand with the Customs sheds and so forth.

Q. You are talking about the American side? A. Yes, sir.

Q. I see. A. And that—then I thought, "will we have to go through Customs on the American side?" That is the first time that this occurred to me, because I was mainly concerned with Mexico.

So at that point I said, "Is all of the marihuana out of the car?"

And at that point my daughter, Susan, said, "No," that the marihuana had just been found and that she had it.

Q. All right. Can you tell us on looking at this sketch about where you were on the bridge—the position that your automobile was on the bridge or the position of your automobile at the time that Susan Leary, your daughter, told you she had the marihuana? A. I can't say exactly. It would be where I would make the decision as to where—

Q. Now, look. Here's the international boundary line, the [329] middle of the river (indicating), and here is the Customs—U.S. Customs house. A person normally drives up here (indicating), turns to their right and drives through here and stops (indicating).

The Court: Suppose you let the witness tell us a little bit about what he did, counsel. You have been pointing and leading with your interrogation all the time. Let him tell us what happened, instead of you telling us.

A. Well, as I say, I didn't realize we were going to have to go through Customs. So it was at the time when I saw a sign or an arrow.

E. Testimony of Petitioner Timothy F. Leary

We went across freely and proceeded to go back the same way. So that would be at the time where I saw you had to turn right that I realized that we were—even though we hadn't been in Mexico we were probably going to have to be routed through Customs. Somewhere—

The Court: You may step down and show us if you wish.

A. (continued) And this is an estimate, because I wasn't thinking of the exact place. Say we were somewhere here (indicating), where you would see the sign that said "Traffic Go Right."

By Mr. Fitzgibbon:

Q. All right. Well, make an "X" mark [330] wherever— A. Well, this is an estimate, but I would say there (indicating).

Q. Dr. Leary, would you—you have placed a mark on the diagram. Now, is that mark the place just about at the end of the bridge, as you recall, or just where you turn right to the Customs? A. I don't know where the bridge ends, but it would be where you—would be about where you would turn right to go into the Customs house.

Q. Let the record show, then, that the witness made an "X" on the diagram, which is perhaps three-quarters of the way from the boundary of the United States to the United States Customs inspection station. When you discovered that your daughter had this marihuana did you ask—what did you do, if anything? What did you do then? What action did you take, if any? A. I didn't take any action. I was driving the car and I turned into the Customs shed.

E. Testimony of Petitioner Timothy F. Leary

Q. Did you—what happened then when you were driving into the Customs shed? A. Some—we parked here (indicating) and the man said that we should drive the car and go up to the—up, probably to the parking stall for baggage inspection.

[331] Q. You heard the witness—the government witness that testified yesterday morning. He sent you to the secondary inspection? A. Yes, sir.

Q. Now, what happened, then, at the secondary inspection? Did you—did you say, "my daughter has marihuana"? A. No, sir. I didn't. When the man—the inspector—I believe his name is Inspector Best—came up to the car, I had in my hand the four visas—four passports with the visa applications, and I explained to him that we had not been in Mexico and I was assuming that we would just drive on.

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[343] *By Mr. Fitzgibbon:*

Q. All right. Now, you know there is a provision—just answer this yes or no.

You know there is a provision to pay— Do you know there is a provision to pay the transfer tax in the law—under the law? A. I know that there is such a provision. Yes, sir.

Q. Now, why didn't you pay the transfer tax in this instance on the marihuana that you had? A. Well, I knew that I couldn't get such a permission. Even in the case of plants like peyote or LSD—I am not allowed to have them because I don't do research in a laboratory and because I use them for religious purposes, and there is no provision in the law for doing it.

I also know that if I had applied for such a stamp I would probably subject myself to investigation and—

Q. You knew you could—

E. Testimony of Petitioner Timothy F. Leary

Mr. Susman: We object to counsel telling what the answer is, your honor.

The Court: I think it's well taken.

By Mr. Fitzgibbon:

Q. Do you know the tax on marihuana—this special tax on marihuana? Do you know the amount? A. It's my understanding that for $1 or $3 you can buy some sort of a permit.

[344] Q. As to the special tax, how much— A. . . . and then if you—if you have marihuana and don't have a permit it's $100 an ounce.

Q. Why didn't you pay that? When you first acquired this marihuana, then why didn't you pay that—make provisions to pay this $100 an ounce? You had a half ounce—$50. A. I was very certain that I would not be able to pay the tax on the marihuana and that not only would it be taken away from me but I would be subjected to action.

Q. Did you or did you not— A. It's well known that many people have tried to obtain marihuana for research and religious purposes and have not been able to get it.

Q. Did you or not entertain the belief that you did not have to pay this tax? A. I consider taxes on pursuit of knowledge or on religion to be a violation against religion. When a man has to pay a tax—or a tax to pay on his religion, I think it's time to say, "You have gone too far" to the agents who want you to pay taxes for these purposes.

Q. Have you written any articles to that effect? A. Yes, sir. I—there have been many articles—as I stated I don't recall—on the fifth freedom. That is the freedom of a man to pursue his inner goals and to [345] expand his own consciousness, and as long as there is no evidence that he is hurting society or other people—I call this

the fifth freedom—and I have written one article which is called "The politics of conscious expansion" in which we tried to explain why we believed that not only that it's the right but it's—we think that it's the goal that everyone should have.

Q. You think that it's a moral right? A. It's both a moral and a political right.

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By Mr. Fitzgibbon:

[347] Q. Now, you explained why you didn't pay the $100 an ounce—why you didn't pay the $1 or the $3 tax provision and register as a scientist.

Forgetting about religion, now, for a moment, why didn't you pay the proper tax that it's possible to pay to experiment with marihuana as a scientist? A. Well, I knew that I wouldn't be able to get the permit.

The Court: Did you make application to the proper authorities at any time?

The Witness: Not for marihuana. No, sir. I had for other chemicals, like mescaline, peyote and LSD.

By Mr. Fitzgibbon:

Q. Were you allowed—were you given a permit for it? A. No, sir.

Q. All right. Then why didn't you make one? Now, why didn't you make one for marihuana? A. Well, the regulations governing the other psychedelic drugs say that you have to research these in a mental hospital; you have to have an M.D. and it has to be done in—behind bars.

E. Testimony of Petitioner Timothy F. Leary

(348) Now, I am not an M.D., I don't have a mental hospital and I can't—obviously, I don't qualify.

Q. Now, there is a provision where people other than a doctor, is there not, can pay—other than an M.D.—

Mr. Susman: Well, we object, your Honor, if he is questioning him on the law. I think the court would rule on that.

The Court: I would sustain that. You need not interrogate this gentleman on what the statutes of the United States provide.

Mr. Fitzgibbon: I realize that, your Honor. I am trying to get from him why he didn't pay the statute—or, why he didn't pay the tax.

A. I knew it wouldn't do any good and I feel it's an invasion of my rights.

I don't ask the government to license me to pursue knowledge. Unless it is hurting somebody else—

I can't say it?

I can give you many other details, but those two reasons are exactly what I feel about it.

By Mr. Fitzgibbon:

Q. Did you or did you not have an honest belief that you could not obtain the permit? A. Yes, sir. I knew—

(349) Q. . . , for marihuana? A. Yes, sir. I had a strong and honest belief that I could not get it and it would just cause a lot of publicity and trouble for both the government and myself. And I am not trying to cause trouble, I am trying to pursue knowledge and in raising my children I am not trying to initiate testing.

E. Testimony of Petitioner Timothy F. Leary

Q. Dr. Leary, this marihuana that you acquired in New York, did you or did you not know that—did you know the source of that marihuana? A. No, sir. I didn't know where it was grown, do you mean?

Q. Yes. A. No, sir. I don't know.

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By Mr. Susman:

(352) Q. Let's go back to when you were turned back from Mexico by the Mexican officials.

At that point, according to your story, it occurred to you that there was marihuana which you would have to take back into the United States and you knew it was illegal? Is that correct? A. No. If you will let me go back again into exactly what happened.

When I first went into this room, Mr. Jorge Garcia said that I could go to Mexico and he wrote on a piece of paper the address of the Gubernacion Office.

The Court: No, Sir. The question that was asked you was this, as I understand it:

When you returned to the United States—

The Witness: Yes.

The Court: . . . You knew that bringing marihuana back would constitute a violation (353) of law?

Was that not it, Mr. Susman?

Mr. Susman: Essentially that. Yes, sir.

A. Well, I knew this at all times, that to bring marihuana into the United States was against the law.

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(357) *By Mr. Susman:*

Q. Would you tell us the name of the person that supplied you with the marihuana, now, please, Dr. Leary? A. During this recess—

E. Testimony of Petitioner Timothy F. Leary

The Court: Just tell us the man's name, if you will, please, sir.

The Witness: Yes.

A. Rosemary Woodruff.

By Mr. Susman:

Q. That was one of the ladies in the car with you? A. Yes.

Q. She supplied it originally in New York? A. Yes.

I phoned to New York during this recess and got her permission to tell you that.

Q. Now, you testified, I believe, that when you were coming back to the United States after being refused immigration visas in Mexico that you were right where the "X" is on that diagram when you found out there was still marihuana? Is that correct? A. Yes, sir.

(358) Q. Now, how, exactly, did it come to your attention that there was marihuana in the car at that moment? A. As I said earlier, Mr. Susman, I assumed that I could drive across—I didn't know the territory—or, I had never driven across that bridge.

When I got to the—when I saw the customs place coming up, it occurred to me that we might be examined by the customs there and I said, "Now, is all the marihuana out of the car?".

Q. Did you say that to everyone in the car generally? A. Yes. And then I moved to the back seat. I am not sure. I said, "Is all the marihuana out of the car?"

And at this point my daughter, Susan, said, "No."

Q. All right. What did you say in response to her statement? A. I don't remember saying anything—just about this time turning into the customs place.

Q. So you just kept going, then? Is that right? A. Well, I had to keep going. I was in the middle of the bridge, or I was on the bridge.

F. Testimony of Dr. Joe Fort

Q. Then, of course, no one in the car declared the marihuana when you got to customs? A. No, sir.

Q. Now, if you hadn't have been searched and the marihuana hadn't been found in the car and in Susan's clothing, (359) I assume you would have gone on into the United States with the marihuana, would you not? A. We were planning to stay the night in Laredo and go back to Nuevo Laredo the next morning.

Q. Well, Dr. Leary, then taking the circumstances as a whole, is it a fair statement to say that you would have introduced the marihuana into the United States without the knowledge of customs, except for the fact that you got caught? A. Yes, sir. That is true.

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(369) Q. Now, the marihuana that you acquired in New York from Miss Rosemary Woodruff—to clarify this point—you had no order form or transfer form for that marihuana? A. No, sir.

Q. Paid no tax on it? A. No, sir.

Q. And you had no order form or transfer form when you came back across the bridge from Mexico, then, with the marihuana? A. That's correct.

Q. You paid no tax and made no registration with the Treasury Department? A. That's correct.

F: Testimony of Dr. Joe Fort

(516) A. I could give, I think, a very informed and educated estimate, but I would certainly stress the word "estimate."

That is not the kind of thing that one can make an exact census of based on the amount of seizures which are usually estimated by experienced enforcement officials as representing about 10 percent of what actually comes into a country.

G: Trial Judge's Charge to Jury

(587) CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury. At this stage of our proceedings, after the parties have offered all of the evidence that they care to offer and after the attorneys have had the opportunity to argue the case to you, it becomes my duty to give the Court's charge.

By that I mean I will discuss with you your function here as jurors; I will instruct you upon the law of the case and discuss the case with you to some extent.

First, as to your function.

Whenever it occurs in the trial of a case that there is a dispute in the evidence, one witness or a series of witnesses testifying that events happened in one fashion, other witnesses or a series of witnesses testifying that the events (588) happened in a contrary fashion, or if they—even if there be no dispute in the evidence, where there is a situation where the jurors must consider their testimony and determine what weight to be given to it; that is, whether it meets the burden imposed by law upon the Government to prove the defendant's guilt beyond a reasonable doubt—in those situations someone must weigh and consider that testimony; someone must determine what is credible and worthy of belief and what is not. Someone must determine where the facts lie. That is the function of you ladies and gentlemen who compose our trial jury serve.

You are the fact-finding arm of the Court. In weighing and considering the testimony you are entitled to accept as true and credible everything that a particular witness may have said, or you are permitted to reject everything that a particular witness may have said.

(589) You may accept part of the testimony of a witness and reject other portions of the testimony of that same witness.

You may want to consider the manner in which the defendant testifies, the impression you got of him while he

was on the stand; you may want to consider whether or not the testimony which he gave seems to be reasonable and consistent with ordinary experience. You may want to consider whether he had any interest in the outcome of the case.

In that respect, it's sometimes suggested that the Government employees, the customs agents or the customs inspectors or others are sort of prosecution-minded in that they may color their testimony, intentionally or not, to favor the Government, to make a little bit stronger case against the defendant than perhaps the facts warrant.

On the other hand, it's also argued that the defendant has the greatest interest in the outcome of the case and that (590) there is a tendency or an inclination for the defendant to color his own testimony because of his great interest.

Those are simply some factors or considerations that you may want to take into account in passing upon the credibility of the witnesses.

I instruct you that you are the exclusive judges of the facts proved and of the credibility of the witnesses and of the weight to be given their testimony.

Now, in this Court I should tell you, too, that the judge is permitted, if he sees fit to do so, to comment upon the evidence.

By that I mean I am permitted to tell you what I think about the credibility of the witnesses, about what I think about the weight of the testimony or even permitted to tell you what verdict I think you should return.

While I expect to discuss the facts in the case with you to some extent, I instruct you now that if from my remarks you draw some conclusion or inference (591) as to my feelings about the facts or about the credibility of the witnesses, it's not intended as an effort on my part to tell you what your verdict or your findings should be. Anything

that I say about the facts or about the witnesses is intended to be of some possible help to you in your consideration of the case and you are entirely justified and warranted in disregarding anything I have to say about the facts or about the witnesses or their credibility. That is your exclusive province and I have no desire to trespass upon it.

The law of the case you will take from the court and be governed thereby.

Now, I instruct you, ladies and gentlemen, that this defendant, as is true of every defendant brought to trial in this court, is presumed at the outset to be innocent.

The defendant starts off with a clean slate, and by pleading "not guilty," as he has done here, has imposed upon the (592) government to prove his guilt to you beyond a reasonable doubt.

By the term "reasonable doubt" as I use it here, is meant such a doubt as may arise in your minds when, after fully and impartially considering all of the evidence, the jurors do not feel satisfied to a moral certainty of the accused's guilt.

A "reasonable doubt" does not mean a mere possible or imaginary doubt or a mere conjecture; a "reasonable doubt" is one which appeals to and is based upon your reason.

If after fully and impartially considering all of the evidence you have a reasonable doubt as to the guilt of the defendant, it's your duty to acquit.

On the other hand, if after fully and impartially considering all of the evidence you are convinced beyond a reasonable doubt of the guilt, then it's your duty to convict.

Now, let us see what it is the defendant is charged with having done, what statutes, (593) what laws he is charged with having violated.

The indictment is in three counts.

The first count, for brevity, I will refer to as the smuggling count.

G. Trial Judge's Charge to Jury

The second I will refer to as the transportation count;

And the third as the tax count.

Failing to—being a transferee, required to pay a certain tax, having transported and concealed the marihuana without the tax having been paid.

The first count, as to the smuggling of the quantity of the marihuana into this country I am withdrawing from your consideration, my reason being that for certain technical reasons as to whether or not there was, in fact, a smuggling of the marihuana under the circumstances shown to exist. So you, ladies and gentlemen, may disregard Count 1.

Count 2 I will read to you briefly.

That on or about the December 22, in the Laredo division of the Southern (594) District of Texas, this defendant and his daughter, Susan, whose guilt or innocence you are not concerned with, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three ounces of marihuana, more or less, after importation, and the defendants then and there knew the said marihuana to have been imported into the United States contrary to law, in violation of 176(a) of Title 21 of the United States Code.

Now, you will note that a reference is made to three ounces of marihuana in the indictment.

The proof shows, as I understand it, that there was not three ounces but about a half an ounce.

I instruct you that that variance—that difference is not material, that the government is not obliged to prove exactly the amount of the narcotics alleged in the indictment and that you—(595) that if you find the defendant to have been guilty of to the half ounce, as shown by the evidence, you may disregard the discrepancy, between the three ounces, as alleged here, and the half ounce, as shown by the proof.

G. Trial Judge's Charge to Jury

The third count charges with respect to the same small amount of marihuana, that at the same time and place the defendant, and Susan, transferees, required to pay the transfer tax imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of marihuana without having paid the transfer tax imposed by the said code, in violation of Section 4744(a)(2) of Title 26 of the Code.

Now, I want to read the statutes to you which the defendant is alleged to have violated.

Section 176(a) of Title 21 of the United States Code, in pertinent part, reads as follows:

(596) Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced—

Now, that has to do with count 1, which I am withdrawing from your consideration. Or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute thereafter provides.

With the further paragraph:

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to (597) authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

What that means, of course, is this:

If the defendant be shown to have had the marihuana in his possession in the United States, such possession

shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana which he had.

The other statute alleged to have been violated is 4744 (A)(2) of Title 26 of the code, reading in pertinent part as follows:

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4744 (A)(1) to acquire or otherwise obtain any marihuana without having paid such tax or, to—and this is the part that we are interested in—to transport (598) or conceal or in any manner facilitate the transportation or concealment of any marihuana so acquired or obtained.

Proof that any person shall have in his possession any marihuana and shall have failed after reasonable notice and demand by the secretary or his delegate to produce the order form required by Section 4742 to be retained by him, shall be presumptive evidence of guilt under this subsection.

I should tell you in connection with this statute what perhaps you already know from the evidence which has come out here before us on the stand.

The law recognizes that marihuana has some legitimate uses. Doctors, veterinarians, dentists and certain chemists, for experimentation purposes may secure from the proper officials of the United States Government the necessary permit to possess and handle marihuana for those legitimate purposes.

The handling of the product, however, is closely controlled by statute and the (599) sections referred to here are those which impose that control upon the handling of marihuana.

One of them requires, as you will understand from the section which I have read, that when a transfer is made

from one person to another such a transfer is taxed—a tax is imposed upon it—and the transferee should, if it be a legitimate transfer, receive a so-called order form, which is a form which may be procured from proper government officials to show that the transfer is, in fact, a legitimate one and that the tax has been paid and the transferee—that is the person who receives it, is obliged to keep that order form in his possession so that if the marihuana be discovered in his custody or in his possession he may show the order form to show that it was legitimate.

And as you will notice, the law provides that proof that any person shall have had in his possession any marihuana and (600) shall have failed, after reasonable notice and demand by the secretary of his delegate to produce the order form, shall be presumptive evidence of guilt under this subsection.

The reference to these—to the secretary or his delegate means—well, I will say this:

The customs agents would qualify. They would be a delegate of the secretary of the treasury, one of those referred to as being a proper person to make demand for such order form.

Now, it is charged that these acts were done unlawfully, knowingly, willfully and with the intent to defraud the United States.

I want to define those term to you.

"Unlawfully", as used here, means simply contrary to law or in violation of law.

The term "knowingly", as used here, means with knowledge; that is, an act is done knowingly when it's done with knowledge and not accidentally or (601) inadvertently or carelessly or by honest mistake.

The word "wilfully", as used here, means that an act is done voluntarily and purposely and with intent to do that which the law forbids, that is, with a purpose either to disobey or to disregard the law.

The term "with intent to defraud", means to act knowingly and with specific intent to deceive or to cheat.

All right. So much for the law of the case.

I want to discuss the evidence with you, and its application to the law as I have given it, as best I can.

I hope and believe that I can simplify the case for you a great deal and I hope to be able to direct your attention to the essential elements and to make it clear to you.

We have heard much testimony here about foreign religions. We have heard testimony that the defendant considered his use of the narcotic which he admitted from the stand was a religious (602) experience.

We have heard testimony that he considered it a scientific or an experimental use on some occasions.

These matters, ladies and gentlemen, I instruct you are of no real significance here, for the reason that if you find beyond a reasonable doubt otherwise the defendant is guilty of the charges here before him, the fact that he may, in good faith—and I am assuming that he was acting in good faith in stating this to you—the fact that he may, in good faith, have considered his use to be in pursuit of the tenets of his religion; the fact that he may have considered it to have been for experimental and scientific purposes; the fact that he may even, for reasons of his own, have considered that the law didn't apply to him, that he shouldn't have been required to secure a permit from the government as other scientists or doctors do, is no defense to the charges here made.

(603) And if you find beyond a reasonable doubt that he committed the acts as charged knowingly, wilfully, unlawfully and with the intent to defraud, as alleged—the fact that he may have considered this to be a religious experience, a scientific experiment, is no defense and you—it would be your duty to convict.

On the other hand, if you have a reasonable doubt that, in fact, he committed the acts as charged, or that he did

so unlawfully, knowingly and wilfully or with the intent to defraud, it would be your duty to acquit.

Now, as to the evidence in the case, it seems to me that it has become a relatively simple matter.

The Government offered testimony, as I remember it—and I will state to you that in all of this discussion of the evidence I am relying only on my own memory and if your recollection is different, by all means, rely upon your own.

(604) As I recall it, the Government's testimony was essentially this:

The car returned to American customs from the Mexican side of the river. Mr. Best, the customs inspector there on the line, gave it a rather cursory inspection, but happened to notice what he thought to be marihuana seeds on the floor board and, of course, that aroused him to greater activity.

He asked the occupants all to step out, took them inside, asked a few questions.

At that time, the defendant, Dr. Leary, who told him—as I recall Best's testimony—that Dr. Leary did not smoke marihuana; he didn't use narcotics; he knew nothing about any marihuana seeds that might have been on the floor of the car.

However, the officers decided on a more thorough search and a more thorough search disclosed that Susan was secreting the silver snuffbox of marihuana.

When confronted with this and after the (605) customs agent, Mr. Hatch, had been called—as I recall Hatch's testimony, it was to the effect that Dr. Leary admitted at that time that he did use marihuana; that this was his, but that his use of it was purely for scientific and experimental purposes and essentially that he didn't consider he ought to be subject to the provisions of law for that reason.

He told Mr. Hatch, as I remember it, and I believe he told us here on the witness stand, that he had acquired this quantity in New York as a gift from a friend. He told

us of having brought it from New York to Laredo and having stopped on one occasion in New Orleans for the night and having made use of a portion of the marihuana at that time, and proceeded from there on to this city.

He told us, as I recall it, that he stopped in this city to make inquiry as to the necessary papers and the insurance he would need in Mexico at the Triple-A (606) office;

That thereafter he proceeded to the International bridge, crossed the bridge into Mexico and had the discussion with the Mexican customs, or perhaps immigration officials on that side;

Becoming somewhat apprehensive about whether he might be violating the Mexican laws he told his group of friends to dispose of all the marihuana in the car;

Being compelled to return across the bridge to Texas, he learned only shortly before driving up to the customs house that the marihuana was still present and that Susan was hiding it.

I believe that is about the sum and substance of the testimony which I consider most controlling from both the Government and for the defense.

The second count which I discussed with you earlier, you will notice, charges the transportation and facilitating the transportation and concealment of the marihuana within this district and division.

(607) Counsel for the defendant have argued to you that you should direct your attention to the period of time after the defendant learned that Susan still had the narcotic and until his vehicle arrived at the customs station, a very short distance while the car was moving upon American soil.

That has overlooked the evidence from Dr. Leary himself, as I remember it, which is to the effect that at all times from New York to New Orleans to Laredo, during the stop at the AAA station and prior to entering Mexico,

by his own admission, as I understood his testimony, he had the marihuana in his possession; he knew he had it in his possession; he knew it was in violation of the laws of the United States.

During that period of time there is no question as to whether he knew or didn't know that it was in the car, whether he knew or didn't know that someone had thrown it out and the (608) uncertainties and the questions that arise from the testimony, if you look at the case only during the short interval prior to arriving at Mexican customs.

Similarly, with regard to the third count. It charges that Dr. Leary was a transferee, required to pay the transfer tax.

He has told us that he had received the narcotic in New York. It's charged that he transported it, concealed it and facilitated the transportation and concealment of it without having paid the tax, in violation of Section 4744 (A)(2) of the Code:

When demand was made at the bridge for the order form, the agent told you that he said that he had no such order form in his possession.

And the statute which I have read to you with regard to this third count provides that failure to produce the order form shall be presumptive evidence of guilt under this subsection.

(609) Now, you might have some difficulty with the question on Count 2 by reason of the fact that the statute requires the the defendant receive—by reason of the fact that the statute provides that one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute provides.

The Government is entitled to rely upon the presumption which I read to you earlier; that is, whenever on trial for

a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.

(610) I mention this a second time because you might be confused about the question of importation.

We are not talking necessarily about the importation or what the government contends was importation here at the bridge.

The defendant has told us that he received the marihuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally and that he knew it had been imported illegally unless he explains his possession to the satisfaction of the jury.

I have defined the terms "unlawfully, knowingly, wilfully, and with intent to defraud."

It's alleged that the acts of the defendant were done unlawfully, knowingly, wilfully and with intent to defraud, and you must so find beyond a reasonable doubt to convict.

I instruct you, ladies and gentlemen, (611) further that the indictment here, which you may take with you to the jury room, is the charge upon which this defendant is brought to trial; it's not evidence of guilt; it's not evidence of anything; it's simply the charge. You may consider it to determine what it is he is charged with having done. You will not consider it any evidence of his guilt in this case.

I instruct you further that in the event of a finding of guilty, in this Court the sentence to be imposed is the sole responsibility of the Court; it's not the responsibility of the jury.

Hence, you ladies and gentlemen will not consider or discuss the possible sentence to be imposed in the event of a finding of guilty.

G. Trial Judge's Charge to Jury

I think that concludes what I have to say to you, ladies and gentlemen, except the fact that the lawyers are entitled to object to my instructions to you outside of your presence and hearing.

(612) If you will follow the Bailiff into my office just for a moment, I will give them a chance to do that.

Anything from the Government?

(Jury retired from the courtroom at 11:55 A.M., March 11, 1966, * * *

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